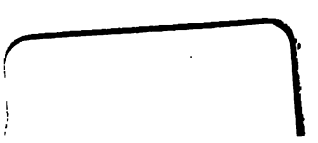
L.L.

Geo. Mauvir

105



DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

VOLUME TWELFTH.

EDITED BY E. DE LAPEYRE

BARRISTER AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY,—9, BOURBON STREET.

1873.

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED

BY A. PISTON, ATTORNEY AT LAW.

1872

SUPREME COURT.

—

SEQUESTRATION, — ACCOUNT-CURRENT, — CLAIM OF BALANCE THEREOF,—BREACH OF DUTY,—BILLS RAISED BY SEQUESTRATOR ON THE CREDIT OF ESTATE,—BILLS EXCLUDED FROM ACCOUNT-CURRENT,—SUGAR BELONGING TO SEQUESTRATION ACCOUNT, PLEDGED ON DOCK-WARRANT,—REMIT TO MASTER TO ADJUST ACCOUNT.

—

Before

His Honor Sir C. FARQUHAR SHAND, KNT., Chief Judge, and
His Honor Mr. JUSTICE J. GORRIE.

—

BRÉARD & Co.,—Plaintiffs,

versus

THE CEYLON COMPANY LIMITED,—Defendants.

—

L. ROUILLARD,—Of Counsel for Plaintiffs.
M. SAUZIER,—Attorney for same.

Hon: E.J. LECLÉZIO,—Of Counsel for Defend-
W. HEWETSON,—Attorney for same. [ants.

—

7th February 1872.

This Action has been entered by Madame Marie Catherine Idalie Jamin, the duly authorized wife of Ferdinand Bréard from whom she is separated as to property, and the latter for the authorization of his said wife and the validity of the proceedings, against the Ceylon Company, Limited, of London and represented in Mauritius by James Henry Mercer, their manager.

After narrating that the Defendants had been appointed sequestrators of the Estate of "Savannah," then the property of the Plaintiffs, and were entrusted with its entire management until the 20th of October 1864, and that the Defendants furnished an account current of their intromissions, the Plaintiffs assert in their Declaration that the balance of $21,551.58 was not the true balance due by the Defendants; they also aver that in breach

of their duty as sequestrators, the Defendants did cause to be done, the following acts: (1st) use the credit of the Estate "Savannah" for their own benefit, by causing the manager under such sequestration, to wit: Mr. Joseph Darné, to sign promissory notes upon which they raised money for their own use, for a sum of about $ 100,000; (2) pledge the sugars of the said Estate for and against Dock warrants and keep such sugars so pledged for long periods, and this as well during such sequestration as at the time when it had actually expired or when it was just about to expire, and this for a sum of about $ 80,000; (3) let out or hire the store of the said Estate situate at Souillac, and placed under sequestration with it, and appropriate or allow others to appropriate the same without in any wise crediting the accounts of the Estate with such rent; and (4) dispose of, directly by themselves, a considerable quantity of sugars of the said Estate, and use the proceeds for their own purposes; and that they have allowed others to do the same without any mention of these facts being made in their accounts, and more especially that they never credited the Estate "Savannah" with the proceeds of 2945 bags of sugar sold to Leishman & Co., and of 529 bags sold to Aikin Bourguignon & Co.; and that they either applied to their own use 3,000 bags of sugar, or allowed the same to be left on the said Estate "Savannah" when it was sold to Mrs. Widow Jamin, although all such sugars had actually been made by them as sequestrators of the said Estate, and during such sequestration; which breaches of duty on the part of the Defendants give rise, as the Plaintiffs contend, to the application of Art. 603 of the Code of Civil Procedure, and entail on the Defendants the forfeiture and loss of all the sums charged by them for Commission. The Plaintiffs further contend that giving effect to the emendations which they set-forth in a statement annexed to the Declarasion, that the real balance due by the Defendants is the sum of $ 131,135.26 as at 30th September 1867, and they pray Judgment that the Defendants may either be condemned to credit the sequestration account with the said sum of $ 131,135.26 over and above the balance admitted by them, or to be condemned to pay the said amount to the Plaintiffs or such creditors as may attach the same; and they claim interest on the new balance, and on the balance admitted by the Defendants, at the rate of 12 per cent from the date of the service of the Declaration, and all costs of suit, the Plaintiffs making certain reservations of their rights to make further demands

The Defendants, by their plea of 21st November 1867, pleaded to this Declaration; (1) that the Plaintiffs had no right or cause of Action by reason of their several allegations (2) that they denied the several facts, matters and things in the said Declaration and particulars setforth (3) that the Defendants were not guilty of the grievance laid to their charge, and were not indebted in the balance brought out by Plaintiffs.

Issue having thus been joined, the further progress of the suit was delayed from that date until this year, in consequence of the Plaintiffs being, as they alleged from their circumstances, unable to bring the issue to trial sooner.

The examination of certain witnesses, *de bene esse*, had been allowed in the meantime, and certain amendments to Declaration tendered, and at length on 19th October 1871 the case came on for hearing. L. ROUILLARD of Counsel for the Plaintiffs opened upon eighteen objections to the accounts and the conduct of the sequestrator; but the whole of these being purely matters of accounting, we referred them to the Master with the exception of the eighteenth being an item of costs to Hewetson in certain proceedings upon which we indicated our opinion at the time, reserving the ultimate disposal to our final Judgment in this cause and the others about to be mentioned which formed the 12th, 13th, 14th, 15th and 16th of Rouillard's objections to the account which we reserved for enquiry and determination by the Court; viz; (1) the charge that the sequestrator had used his position to raise bills on the credit of the Estate which he had not brought into the account; (2) that he had pledged sugars on Dock warrant in like-manner; (3) that he had misappropriated various quantities of sugar; (4) that he had lent the store at Souillac without rent, or at least had not accounted for the rent in his accounts. Upon those questions much evidence was heard by us on the 23rd day of October and several subsequent days, and parties having been fully heard by their respective counsel, we took the important matters pleaded before us into our consideration, and we now pronounce the following:

JUDGMENT.

This case is the sequel of others which have been formerly before this Court in connection with the Estate "Savannah." In the reports of these former Actions in PISTON'S, on 22nd September and 5th October 1864, and a case as to production of vouchers in 1867, the terms of the appointment of Arbuthnot, then managing Director of the Ceylon Company, to be sequestrator, will be found alluded to.

1. As to the Bills or Promistory notes excluded from Account,

It is not denied by the Defendants that they required Darné to draw bills for his advances, and that they discounted those bills at the Bank, either for the purpose of obtaining the money for the necessary advances or for subsequently recouping themselves, so that their own balances should not be diminished by the advances they had made. The bills or part of them or rather the Promissory notes signed by Darné as "administrateur judiciaire de "Savannah" have been produced. He promises to pay at a fixed date a certain sum which has been received by him in cash for the wants of the Estate. The documents were endorsed by Arbuthnot the managing Director of the Defendants and discounted by the Oriental Bank Corporation. When the Court appoint a sequestrator and fix or contemplate a percentage and commission for his services, it is in the expectation and on the understanding that the sequestrator is to advance the funds necessary out of his own proper means with the banking or other arrangements which the sequestrator may enter into for the purposes of the business, the parties interested in the Estate have nothing to do, nor would the Court permit its process to be used for the purpose of revealing in a Court of Justice arrangements which the Banks and the sequestrator had made for their mutual advantage and with which they, the only parties concerned, were contented. The position of affairs here, however, is something very different. The Plaintiffs alleges that the sequestrator did not in point of fact make the advances required for the Estate and for which he charges the sum of 12 per cent as commission, but that having caused Darné the manager, under the title of "administrateur judiciaire" to emit promissory notes for the wants of the Estate, the money was advanced by the Bank to Darné in this capacity, at the rate of 10 per cent, the position of the managing Director of the Ceylon Company becoming that merely of the agent who took the Bills to the Bank for the purpose of getting them discounted with his indorsation.

The allegations go even farther than this and to the length that money was thus raised much more than sufficient for the wants of the Estate, and that the sequestrator employed his position to obtain money for the general purposes of his Company.

These bill transactions are kept out of the accounts as filed, these being presented as if the sequestrator had from his own resources made the necessary advances for the "entrecoupe." We have considered this question with a due regard to all that has been advanced by the Company as to what was the practice at the time they were appointed sequestrators, to the impossibility of any company such as their's conducting business on an extensive scale without applying to Bankers for advances, and to the undoubted benefit which such companies are to the most important interests of the Colony, and especially to the service which the company rendered to this particular Estate and those interested in it by accepting the position of sequestrator at a season when capitalists were unwilling to take upon themselves the liabilities of the "entre-coupe" of those great concerns. After giving all due weight to these considerations, the question remains to be solved whether in the face of the transactions which actually took place, it can be said that the sequestrator really advanced the money and whether he did not also in point of fact raise more money than was necessary by pledging the credit of the Estate through its manager.

It is clear that the first thing necessary for the elucidation of this point is to have the Bills brought into the account. They did pass, they do form part of the vouchers now on the table of the Court, and before we go further we must have an account with these large amounts duly inserted in their proper places, as they were obtained from the Bank on discount, and as ultimately paid to the Bank when the bills became due. When this is obtained, we shall be better able to determine what amounts have been advanced by the sequestrator, what his claims are under the aspect of affairs which may then present itself, and generally how best to dispose of the questions which have arisen with justice to all parties. We, therefore, remit to the Master to obtain from the Defendant the accounts of the sequestration stated, by bringing to the debit and credit respectively, the promissory notes granted by Darné as "administrateur judiciaire" of "Savannah" and discounted by the Bank, and the amounts paid to the Bank to retire those promissory notes when due as of their proper dates respectively.

II. Pledging the sugars on Dock-warrants:

The allegation of the Plaintiff that certain quantities of the sugars of the Estate pending the sequestration, or sugars belonging to the sequestration account, were placed under Dock-warrant, has also been admitted and justified by the Defendants. We have had from more than one source detailed accounts of the sugars so dealt with. The money received from pledging the sugars in this manner was not brought to the credit of the Estate; and the sequestration accounts as given in do not exhibit in any manner that the proceeds of the crop had been thus used. If the Defendants had been able to shew us that the pledging had been a matter of imperious necessity, with the object of preventing loss to the Es-

tate during some season of remarkable depression of prices, we could at least have understood the argument and appreciated better the position of the sequestrator if at the same time we had found that the amounts obtained from the Dock Warrants had been at once carried to the credit of the account. The argument which was addressed to us on the part of the company was something very different from this: It was contended that the sequestrator acting under his general powers as such, might, for reasons known to himself alone, pledge the sugars on Dock warrant, abstain from carrying the amount to the credit of the Estate, (thus apparently securing the use of it for other purposes) and charge the Estate interest on the balance of advances then current, as if neither sugars had come in, nor money been obtaining by pledging them with the Bank, for advances. We cannot accept of such a definition of the powers and privileges of a sequestrator. His obvious duty is not to speculate with the produce of the Estate, even if the result of the speculation should be beneficial to the Estate itself. Far less is he justified in speculating with the produce for his own benefit. The sugars ought immediately, or within such a reasonable time as might be requiring for making due enquiry as to the best mode of disposing of them, be sold, and the amount carried to the credit of the Estate, to keep down, as far as possible, the advances on which a heavy charge is running for interest, and even where the balance stands in favor of the Estate, to bring the price of the crop into the account as speedily as it can be realized with prudence and discrimination.

We accordingly order these accounts to be adjusted by crediting the Estate with the market price of the sugars, immediately, or within a reasonable time, after their arrival in town, and all charges of insurance and others caused by their being kept under Dock Warrant to be struck out, and we remit to the Master to see the account adjusted accordingly.

The Plaintiff contends that by so dealing with the property confided to his care, especially in the matters of the bills and the Dock Warrants, the sequestrator has brought himself within the operation of the rule contained in Art. 603 of the "Code de Procédure Civile: " Le gardien ne peut se servir des choses saisies, les louer ou prêter, à peine de privation des frais de garde, et de dommages intérêts, au paiement desquels il sera contraignable par corps."

The general rule of law with regard to sequestrations is that they bear an affinity to seizures and to guardianship as defined with reference to seizures. The acts of the sequestrator in this case which are impugned, undoubtedly bear an aspect of gravity. He has made use of the property intrusted to his care by placing it on Dock warrant, and not carrying the amount obtained to the credit of the Estate, and undoubtedly the Court has the power to withhold the Commission stipulated in cases where acts have been done with the obvious intention of damaging the Estate for the personal benefit of the sequestrator. We do not, on the other hand, hold that we are bound by the article quoted, in all cases, to inflict a penalty of this nature on a sequestrator holding a position by our law and customs which confers upon him such extensive powers with regard to an Estate and requires of him duties so different from a mere guardianship of real or personal property under seizure, should he have acted with the produce, and stated his accounts in a manner different from that which the Court may ultimately allow. We have already in the case of the bills ordered them to be brought into the account, in order that the Estate may be benefited by what actually took place, and we have ordered that the Dock Warrants be kept out of the account, and the price of the sugar credited as if sold within a reasonable time of its reaching town, and we are not disposed, in the circumstances to go farther than this at this stage of the cause, reserving to ourselves full liberty to deal with the matter of commission on the Report of the Master, as shall then appear to us just and expedient.

III. The amount of sugars:

The question as to the amount of sugars which ought to have been credited to the sequestration account is one which caused much trouble and anxiety to the Court, from the very unsatisfactory mode in which the books of the Estate had been kept, and from the position assumed by the Defendants. The books of this sugar Estate stated to be one of the largest and most productive in the Island, at that time, consisted solely of certain pencilled memoranda in certain unbound memorandum books which were produced before us. Indeed all that there was to shew us the produce of the Estate for the crop in question, that of 1864—65, and the amount of sugar made and despatched to town for sale up to a given date, consisted of three half pages of memoranda altered and corrected, at the end of the pay sheets of the laborers for the months of August, September and October when the crop was in progress.

When a sequestrator is appointed by the Court, We at least expect full and exact accounts taken from books properly and regularly kept, and which have been inspected and checked by the sequestrator himself as the business of the Estate proceeds. Moreover at

the time of the sale of the Estate, on 20th October 1864, the Ceylon Company had at once become the agents in town for the new proprietor, so that for a time, at least, the Company held the delicate position of acting under the appointment of the Court as sequestrator and on their own account as agent for the buyer who had a different interest. In such circumstances the utmost care should have been taken to ascertain and fix clearly the quantity of sugar which, was to enter the one account, and that which, after the sale, belonged to the buyer and to make every thing appear on the face of the accounts so that neither the Court nor the parties interested should have been left in the dark as to the disposal of any portion of the crop for the year.

In place of this being done, no special account was taken of the amount of sugar made up to the date of sale, or packed in the sugar house, ready for removal, or remaining in the coolery, manufactured but not packed. It was stated at the bar, for the Company, that acting under the advice of counsel they had treated all the sugars received in town before the day of the sale, as belonging to the sequestration account, and all received after, even tho' bearing the mark of Bréard and Co., and shipped in the coaster before the sale, as belonging to the new owner. Even if this advice had been perfectly sound in law, the mode of dealing with the sugars ought to have appeared in the accounts, for the satisfaction of the parties interested and the justification of the sequestrator himself, and not been hidden in the books of the Company and the account of the new owner.

After examining and re-examining the manager of the Estate during the sequestration, and certain employés whose names were incidentally mentioned during the progress of the cause, after ordering to be brought into Court the scraps and memoranda to be found in the Estate, the books of the Ceylon Company itself, the invoice books of the keeper of the store at Souillac, who received and despatched the sugars, and the books of the Albion Dock where the sugars were received and from which they were despatched, when sold or disposed of, we have gained a certain amount of information about a matter which ought to have been made clear and patent to all on the face of the accounts themselves.

We cannot say that the result we have arrived at is perfectly satisfactory, but we have endeavoured by a careful collating of the evidence, and by ourselves checking the memoranda kept on the estate, item by item, with the other books produced, to arrive at the best possible result in the circumstances among the evidence as to the amount of sugar remaining on the Estate, either packed or ready to be packed, at the date of sale, we found that of Mr. Darné the manager was any thing but exact. In his first examination he told us that at the date of the 20th of October there remained packed at the sugar house about 225 bags, and in the coolers about 450 bags. In his examination on the 1st December, he said that he had despatched 150 bags to Souillac on the morning of the 21st of October; that after those were sent, there remained about 150 bags on hand, and there were sugars in the coolers and turbined about 550 bags. Mr. Didier the accountant on the Estate, and whose evidence the Court ordered to be taken by commission because of the illness of the witness, gave a very different account of the amount of sugar remaining in the sugar house at the date of the sale. He stated that at that date there were about 2,000 or 2,500 bags of sugar piled up in the sugar house, and that these were afterwards marked "A. Jamin" upon which he, the witness, had remarked to Darné that the sugars belonged to the sequestration for that part made before the 20th October. He admitted, however, that there were 400 or 500 bags in the pile manufactured after the 21st of October, and sugar which was manufactured on the 20th and turbined on the 21st; but all the rest he was sure had been packed and piled before the 20th October. It was not suggested that Didier had any enmity to Darné as was the case with one of the witnesses, or that he had any interest in the matter in any way which could render his testimony suspected. It was necessary therefore to examine his evidence very minutely, for if true it not only showed a much larger amount to be due to the sequestration, but the evidence of Darné, the manager, on this subject to be false. Fortunately the witness supplied us with a test by which we might judge of his accuracy as to the time when the bags were so piled up. He stated that Mr. Henry Bousquet an engineer must have also seen those bags. We caused Mr. Bousquet to be examined. His memory was not clear on the subjects on which he spoke. One thing however was manifest from certain letters to Darné which he acknowledged to be his, and which are produced, that he had not been on the estate between the 9th and 28th days of October. If the period to which Didier speaks was after the 28th of October, then the explanation of Darné as to the pile of sugar bags in the sugar house is very natural and credible, viz: that on the 21st of October when he received notice of the sale from De Mouhy the agent of the new proprietor, he was told not to dispatch any sugars to town until a new stamp for the bags had been sent; during this period the mill continued at work, and as it was pro-

ducing from 200 to 300 bags a day, the accumulation for seven days would be from 1,400 to 2,000 bags. In point of fact we find that there was a cessation, for the time, of the usual despatches from the Estate to Souillac. Mr. Bousquet mentioned that he had seen sugar carted away from the Estate with no other mark than that of "Savannah," and that Darné had explained this by saying that he had not got the new mark. But as Darné's evidence confirmed by that of de Mouhy, was that he did not get the new mark till the 28th and Bousquet's visit must have been after that date, the probability is that Mr. Bousquet saw sugars in the sugar house which had not yet been marked and that the sugars he saw carted after that date were those which are shown by all the books to have arrived in town with the mark V. A. Jamin.

We are satisfied from Didier having referred to the presence of Bousquet, and that bags made subsequent to the 21st were also in the pile; that the date of his conversation with Darné must be drawn back subsequent to the 28th of October. The remark which he made that those bags made previous to the 20th belonged to the sequestration, was still quite just, as according to Darné's own showing there were at least from 150 to 225 bags in hand (he put the figures both ways) and Darné and Didier combined that 550 bags to 600 bags were in the coolers on the 20th and these had all been piled promiscuously with the sugar made after the 20th. The sugars in the coolers had apparently been marked "Jamin," but accordingly to our view of the duty of the sequestrator, they, as well as the sugars on hand in bags on the 20th, ought to have been accounted for, whatever may be their ultimate destination.

It is unfortunate that we have no other information as to the number of bags actually in the sugar house, except the recollections of the manager and the accountant of the Estate, and if in coming to our conclusion we have been obliged to grope after the truth in place of having the amounts clearly placed before us in properly kept account, the blame lies with the sequestrator, for his want of care and exactitude. We do not fail to keep in view that these occurrences are now more than seven years' old, and that the remarks which we make refer to the direction of the Ceylon Company at a time which is past, and which we have not the slightest reason to suppose are applicable to it now, or that any accounts to be presented to us, should the managing director of the Company be again appointed sequestrator by the Court, would not be presented in a complete and business-like shape.

We find from Darné's evidence, confirmed by the memoranda which we have already mentioned by the counter-facts of the quantities despatched to Souillac, mainly kept in the handwriting of Didier, and by a statement of the crop of 1864—65 contained in document Z which altho' not original is, we are satisfied, a correct copy of a statement made up by Didier at the time, that 9,106 bags were despatched to Souillac by the 20th October, the day of sale, for immediate shipment to town. That at the same date there remained in the sugar house, packed and ready to be forwarded, a quantity which is variously estimated at 275 and 300 bags, of which 150 were despatched on the morning of the 21st October, and in addition, that 600 bags remained in the coolers, which were subsequently packed and marked "Jamin," but which ought to have been accounted for by the sequestrator. The difference between the two statements above mentioned of bags remaining in the sugar house marked "Bréard" after the 150 had been sent to Souillac, is 75, and making a rough calculation that three fourths of the difference was near the truth, it will give us 208 bags marked "Breard" as in the sugar house. This makes in all a total of 10,064 bags for which the sequestrator ought to account. Having arrived at the amount of sugars to be accounted for in this manner, it is not necessary that we should pursue the different parcels sold through the hands of the different merchants, a process which the Plaintiff was obliged to adopt, as the Estate memoranda were not open to him and full explanations were, as he alleges, withheld. It may, however, be noticed that the number of bags admitted by the Defendants to have arrived in town at the date of the sale was 7,791; that 1465 bags marked "Bréard & Co." arrived afterwards, which according to their reading of the law, belonged to Jamin, but which we require to be accounted for by the sequestrator until the question of ownership be determined in a competent form, making in all 9,256 bags. If to these be added the number which we find to have been in the sugar house in bags, or in the coolers, and which the sequestrator must also account for in the meantime, subject to the same provision, viz: 808, the total will be found to be the same as that already mentioned viz: 10,064 bags. The same result is arrived at by taking the Dock books, and the "Battelage" book as our guides. From these it is found that 7,791 bags arrived before the 20th of October and the witness Lochon showed that the 1,011 bags sold to Leishman and certain portion sold to Bourguignon & Co., were marked "Bréard & Co.," and arrived after the 20th of October. Although the fact is not specifically brought out, it will be found from his evidence, that all the sugar which arrived in

town up to November 5th but exclusive of that date, was marked "Bréard & Co.," and this agrees with the evidence of Darné and others that the new stamp was not obtained and put in use until the 29th October at soonest. The cargo which arrived on the 7th of November was 798 bags, the first instalments of the accumulation of the "Jamin" sugars which had taken place between the 21st and 29th October. Adding then the quantity arriving at the Dock up to the 5th November exclusive, we find 1,673 bags has to be added to the 7,791 already in town, and if to these be added the 600 bags in the coolers -which were marked "Jamin," we arrive at a total of 10,064, bags once more as the amount to be accounted for in the sequestration accounts. We therefore, direct the Master to be guided by this result, and to have the accounts adjusted on the footing that the sequestrator has to account for 10,064 bags of sugar, of such qualities and prices as he may be able to instruct; the question of the actual property of the sugars arriving in town after the sale, marked "Bréard & Co.," and the 600 bags in the coolers on the 20th to be afterwards determined when brought before the Court in competent form. The curious entry of 924 bags of sugar entered in of the accounts put in by the sequestrator, but not repeated in the general account, we are disposed to regard as an error. We have had before us Mr. Wiehé the present acting manager of the Company who stated on oath that he had carefully examined the accounts, and the other accounts of the Estates at that time under the charge of the company, and that he could not find any such entry as that of 924 bags of sugar, and could not explain it. We accept of Mr. Wiehé's explanations as the truth on this matter so far as it can be ascertained, and direct the Master to have the accounts adjusted without requiring the Defendants to account for 924 bags in addition to the quantity already indicated. We cannot help observing, however, that where such errors are possible, there is an opening for fraud against which the Company cannot too carefully guard themselves and their clients.

IV. The charge of lending without rent the store at Souillac, belonging to the Company, to others, has been withdrawn by the Plaintiffs; the explanations given being sufficient, and the course adopted not having been beyond the powers of the sequestrators in the ordinary discharge of his functions.

It only remains to add that whether interest will be allowed in the balance which may be found in the hands of the sequestrator is a question which will also be better dealt with when we have had an opportunity of ascertaining how the account stands after it has been adjusted by the Master under the former remit to him, and the instructions contained herein.

Costs meantime reserved.

SUPREME COURT.

—

SECURITY FOR COSTS, — DISCRETIONARY POWER OF JUDGES THEREON,—NONSUIT.

Circumstances under which the Court exercising its discretionary power, ordered a Plaintiff who had put his whole property beyond the reach of attachment for the costs of the lawsuit raised by him, in which he had been condemned, to find security for these costs.

—

Before

His Honor SIR C. FARQUHAR SHAND, KNT.,
Chief Judge, and
His Honor Mr. JUSTICE BESTEL.

—

MARION,—Plaintiff,

versus

TYACK,—Defendant.

—

T. L. JENKINS,—Of Counsel for Plaintiff.
F. SIMONET,—Attorney for same.

L. ROUILLARD,—Of Counsel for Defendant.
J. PIGNÉGUY,—Attorney for same.

—

7th February 1872.

This is a dispute about the ownership of a piece of land in the District of Savanne, of which the Defendant is in possession. It appears that the Plaintiff, some time ago, applied for a writ *habere facias possessionem* to oust the Defendant, but the Court found the application was incompetent dismissed it with costs. The Plaintiff then raised the present suit concluding that the ground in question should be awarded to him as his property, with damages for the alleged destruction of certain buildings by the Defendant, and costs of suit.

The Defendant submitted, in the outset, that before the merits of the case were gone into, the Plaintiff should be ordered to pay the costs of the former proceedings in which he had been condemned, amounting to £21.11.0 or at least, looking at the conduct of the plaintiff and the very peculiar circumstances of the case, that he should be ordered to find security for any costs that might be awarded against him. It appeared that the Usher when sent to recover payment of the previous costs had made a return of *nulla bona*, and the Plaintiff had within 14 days of giving the Defendant notice that he was to raise legal proceedings against him, alienated the whole of his property in favor of his own daughter declaring in the deed that she had previously paid him the price.

The Plaintiff contended that this was not a case of nonsuit, that the merits of the dispute between the parties had not been gone into, under the former proceedings, that there was no rule of law compelling a Plaintiff in such circumstances either to pay the former costs at this stage or to find security for future costs.

THE COURT.

It might possibly be doubted whether as of matter of right, the Defendant's motion for previous payment of the former costs before permitting the Plaintiff to go on here, could be supported. It will be remarked that there was no nonsuit in the former discussion—indeed the form of the proceedings could scarcely have admitted of a nonsuit and though the possession of the plot of ground was in question the merits of the respective claims of parties were not inquired into. We are therefore called upon to exercise our discretion, and to say whether, looking at the peculiar circumstances of this case, the Plaintiff before going farther should be ordered to find security for costs in the event of costs being awarded against him. This is always a delicate question. The Court will not readily interfere with the ordinary right of any Plaintiff to bring his case to a hearing without any preliminary obstacle in the shape of security for costs or otherwise. But cases, occasionally but rarely, occur where the interests of Justice require that the rights of Defendants be protected in the matter of costs, where for example a Plaintiff who is really a pauper and does not choose to sue in that character and give the necessary evidence of his having a *probabilis causa litigandi* and has taken means to put his whole property beyond the reach of attachment for costs, or is placed in an unusual and exceptional position with respect to his opponent recovering his costs if awarded against him, persists in going on with his Action, he will be ordered by the Court to find security for costs up to a reasonable amount. This is a matter of discretion which the Court must exercise when called upon to do so judicially by a Defendant.

It is the practice in the Courts at home, both of laws and equity, and we ourselves have had occasion to exercise this power on other occasion.

Each case must be determined on its own facts.

In the present suit the Court stays further proceedings till the Plaintiff finds security to the amount of £25 for any costs which may be awarded to the Defendant.

SUPREME COURT.

NOTARIAL DEED,—BREACH OF PROMISE OF CONTRACT, — ALLEGATION OF FRAUD, — ACTION IN DAMAGES,—DEMURRER,— C. C., Arts : 1341, 1347 & 1348.

Refusal by the Court to allow the Plaintiff to prove, by oral evidence, under what conditions he acknowledged, by notarial deed, being indebted to the Defendants in a certain sum for which he granted them a Mortgage on his property to secure the payment of such sum.

Action in damages owing to the alleged illegal seizure of Plaintiff's property dismissed.

—

Before

His Honor Mr. JUSTICE N. G. BESTEL,
First Puisne Judge, and
His Honor M. JUSTICE J. GORRIE,
Second Puisne Judge.

—

BARLOW,—Plaintiff,

versus

ARBUTHNOT & GUFFLET,—Defendants.

—

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master, | F. HERCHENRODER, Esq., Registrar
J. A. ROBERTSON, Esq., Substitute Master, | L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
J. H. SLADE, Esq., Registrar.
J. BOUCHET, Queen's Proctor.
G. A. RITTER, Marshall.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E,	1828	Jenkins, T. L.	1865	Brown, R. M.	1870
Campbell, C. M.	1841	Florent, E	1865	Lionnet, F.	1870
Naz, Hon. V.	1857	Lionnet, H.	1866	Ollier, R.	1870
Bazire, E	1858	Lapeyre, A. E.	1866	Poulin, F.	1870
Leclézio, E J	1858	Desmarais, E.	1866	Forget, A.	1870
Pellereau, E.	1860	Bazire, E.	1867	Thibaud, L. A.	1871
Martin Moncamp, P. G	1861	Galéa, H.	1867	Pelte, E.	1871
Rouillard, L	1861	Lemière H	1868	Desenne, O	1871
Wilson, H.	1863	Avice, H	1868	Boucherat	1871
Chastellier, P. L	1864	Beaugeard, P.	1868	Galais, E.	1871
Delafaye, V.	1864	Pilot, G.	1868	Mathews, L. F.	1872
Guibert, G.	1864	Vaudagne, E.	1868	André, A.	1872
Newton, W.	1864	Hamon, A.	1869		
Lepoigneur, I.	1864	Serret, E.	1869		

ATTORNIES (actually practising).

Pastor, E	1840	Piston, A.	1860	Rodesse, C.	1864
Mercier, J	1840	Laval, V.	1860	Gilot, F.	1865
Lalandelle, G.	1842	Chazal, P. E. de	1860	Halais, J.	1865
Hewetson, W.	1846	St-Perne, E. P	1860	Sauzier, M.	1866
Laurent, E.	1846	Tessier, G	1860	Sauzier, E.	1866
Ducray, E.	1848	Victor, F.	1860	Commarmond, A	1867
Hitié, U.	1850	Mallet, F.	1861	Robert, A	1868
Pignéguy, J	1850	Ducray, V. G	1861	Desjardins, E.	1870
Pastor, H.	1850	Gautray, C.	1861	Rousset, C.	1870
Colin, A J	1851	Sicard, N.	1862	Wohrnitz, L.	1870
Pragassa, V	1851	Simonet, F.	1863	Erny, P. J. A	1871
Guibert, J	1853	Pitot, A	1863	Rolando, A	1871
Finniss, W.	1853	Bétuel, A.	1863	St. Pern, L. de	1871
Slade, J	1853	Boullé, V.	1863	Ganachaud, E.	1871
Bouchet, J	1853	Rodesse, L. C.	1863	Ellie, J.	1871
Duvivier, Ed.	1853	Bertin, H	1864	Lastelle, F.	1872
Robert, F.	1857	Ritter, G A	1864	Edwards, E.	1872
Ackroyd, J	1859	Perrot, A	1864	Leblanc, W.	1872
Desperles, L	1859	Rohan, A	1864	Margeot, E.	1872
Herchenroder, T.	1860	Astruc, A	1864		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 2.

CONTENTS:

EDITED BY A. PISTON

ATTORNEY AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY AND P. DUBOIS,—9, BOURBON STREET.

1872.

E. Pellereau,—Of Counsel for Plaintiff.
~~L. Mercier~~,—Attorney for same.

P. L. Chastellier.—Of Cousel for Arbuth-
G. A. Ritter,—Attorney for same. [not.

W. Newton,—Of Counsel for Gufflet.
W. Hewetson,—Attorney for same.

—

7th February 1872.

This was an Action in damages to the amount of $ 120,000 for losses alleged to have been caused to the Plaintiff by the Defendants who, it was alleged, with the view of defrauding and injuring the Plaintiff acting as well for themselves as on behalf of George Robinson represented by George César Bourguignon, did falsely represent and promise to the Plaintiff, that if he, the Plaintiff, would acknowledge by a notarial deed the amount due by him and give the three Defendants a mortgage for the same, so as to secure payment with priority over other creditors, they the Defendants would bind themselves to give him time to pay the debt and to receive the bills of the Plaintiff in the manner stipulated between parties and that they would, moreover, waive the priority of their claim in favor of any person or persons who might consent to make the advances for the crop of the Estate "Lucia" for the year 1867.

It is further averred in the Declaration that confiding in the promises made by the Defendants to him the Plaintiff and expecting that the Defendants, would at the same time, bind themselves by a special agreement in the several promises above mentioned, he the Plaintiff signed the notarial acknowledgment required of him, but that the Defendants declined to enter into any act embodying the above promises made by them, thereby evincing that they had used false pretences to obtain Plaintiff's signature to the said deed, on obtaining which signature the Defendants jointly with George Robinson, represented as aforesaid, caused the Plaintiff's Estate "Lucia" to be seized and sold to the great damage of the Plaintiff who values the damages sustained at the sum of $ 120,000.

The Defendants Gufflet & Arbuthnot pleaded not guilty to the grievances complained of the penality of the proceedings in forcible ejectment and of the adjudication of the Estate "Lucia." Issue was thereupon joined.

P. L. Chastellier & W. Newton were respectively heard for the several Defendants and E. Pellereau for the Plaintiff, on a preliminary objection which, in substance, is no less than a demurrer to the action.

JUDGMENT.

Assuming all the allegations in the Declaration to be proved, Barlow's Action must be dismissed.

Why? Because in the terms of Art. 1341 C. C. "il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes." Again, because Barlow is not within any of the exceptions to that general rule enacted in Arts. 1347 and 1348 C. C.

True it is that a fraudulent conspiracy is charged against the Defendants. But assuming that any such conspiracy originally existed in the minds of the several Defendants, surely the very seizure and proceedings in ejectment could not fail in opening the eyes of the Plaintiff to the breach of promises alleged to have been made to him by the Defendants previous to his attaching his signature to the notarial admission of his debt and mortgage in favor of the Defendants. He might have objected to the seizure, to the sale which, however, never quarelled more than that. He lent himself to the wishes of his opponents, assented to the sequestration of the Estate pending the levy up to the sale of the Estate. We find no protest of any kind against such seizure and sale which were never quarrelled up to the date of the present action.

What must be the inference? that the allegation of fraud has found its way into the Declaration for no other purpose than that of securing admission to this Court, and to reopen a question which if not arranged to the satisfaction of the Plaintiff has been so by the Plaintiff's own carelessness and which he might have so easily avoided by having inserted in the mortgage deed the agreement which he alleges was come to between parties before giving his signature to the deed. Had he insisted upon this being done, and had such insertion been refused he, on his side, would have refused the acknowledgment of his debt, and the mortgage required of him in consequence of such admission.

The wrongs and losses alleged to have been sustained would then have been avoided, and the fraudulent practices of the Defendants, if any, would have been defeated. This is what the Plaintiff should have done, and this he has not done. He must, accordingly, bear the consequences of his own acts.

As it is impossible for us, practically, to set aside the notarial deed upon which the levy proceeded, to assume contrary to Art. 2213 C. C. that the sale had been sued for and

completed without any title "titre authentique ou exécutoire, pour une dette certaine et liquide," and that the mere *pourparlers* which may have preceded the formal execution of a deed upon which important consequences have followed, can be at any time thereafter set up as the foundation for a claim of damages on the ground of fraud against one of the parties to it, by another who has given his express or tacit consent to all that has followed on the deed itself. The action must be and is hereby accordingly dismissed with costs.

SUPREME COURT.

—

ABSENTEE, — VACANT ESTATE, — CURATOR THEREOF,— ILLEGAL OCCUPATION,— ERRONEOUS AVERMENTS,— AMENDMENT OF PROCEEDINGS, — ACTION IN DAMAGES,— COSTS.

Where the Court allowed the Plaintiff to amend certain erroneous averments contained in his proceedings, such misstatement not affecting the material basis on which the case truly stood.

—

CURATOR OF VACANT ESTATES, — Plaintiff.

versus

AVLACSING *alias* ABEELACK,—Defendant.

—

Before

His Honor SIR C. FARQUHAR SHAND, Kt.
Chief Judge and
His Honor Mr. JUSTICE BESTEL.

—

Hon. E. LECLÉZIO,—Of Counsel for Plaintiff.
E. LECLÉZIO, *Senior*,—Attorney for same.

L. ROUILLARD,—Of Counsel for Defendant.
V. G. DUCRAY,—Attorney for same.

—

7th February 1872.

On 3rd October 1870 an application was presented to the Judge at Chambers by the Curator of vacant Estates, with the written consent of the HONORABLE THE COLONIAL TREASURER for an Order that a Rule should issue putting the Curator into the possession of the undefended rights of François Rué who, "it was stated," is absent from the Colony wherein he has no known agent or representative although he has property to administer and interests to defend. The application was supported by an affidavit stating that Rué was about the year 1,778 the owner of landed property in the District of "Plaines Wilhems" at the place called "Rivière des Papayes," admeasuring about 156 arpents.

The Judge at Chambers granted an Order for a Rule to issue in terms of the prœcipe, and on the 5th October thereafter, the Court sent the Curator into possession of the undefended rights of François Rué who is absent from the Colony wherein he has no known agent or representative although he has property to administer and interests to defend.

On the 25th July last, the Curator of vacant Estates raised a suit against the Defendant, setting forth that the late François Rué, at the time of his death, was the owner of a landed property in the District of Plaines Wilhems of 156 acres or thereby, bounded as therein stated; that the Plantiff had been put into possession of his vacant Estates, that the Defendant without his consent and without any title whatever had, and did still, occupy the said land, cut down and carried away wood and still continued to do so to the great loss of the Estate of the said late François Rué: that the Defendant had been duly and formally summoned to quit and abandon the said property and to pay the sum of $ 4,000 as damages to the Plantiff for the illegal occupation of the property and the value of the timber cut down: that notwitstanding the said notice, the Defendant still continue to cut down and carry off large quantities of timber fire-wood and charcoal to the great loss and damage of the estate. Whereupon the Plaintiff concluded that he should have Judgment of the Supreme Court ordering "the said Defendant's to cease, forthwith, to cut wood and make charcoal on the said landed property and carry away the same there from and to pay to the said Curator of Vacant Estates acting as aforesaid the sum of eight thousand dollars as damages for the illegal occupation had by the said Defendant of the said landed property during the time above specified and for the loss and prejudice sustained by the Estate of the said François Rué thro' the Defendants cutting down and making on the said landed property large quantities of timber, fire-wood & charcoal, and carrying away the same from the said landed property knowing that the said landed property, timber, fire-wood and charcoal were not his the said Defendant's property."

The Plaintiff further asked that the Judgment to be given should be executed by caption of the Defendants body."

The Defendant pleaded that in the circumstances the Plaintiff had no right title or capacity to raise and follow out the suit :

L. ROUILLARD in support of the Defendant : The Plaintiff was sent into possession on the allegation that Rué *was out of the Colony* and had left no one to represent him : but it is now established by authentic documents which I produce that he died in the Colony in the year 1800 rnd left certain relatives, in France, the heirs of his whole property moveable and immoveable. The whole proceedings have been taken in ignorance of the facts, and the later proceedings are inconsistant with the earlier. No amendment is admissable in such circumstances.

HON. E. LECLÉZIO for Plaintiff : The Government sent us notice that there was reason to believe that the Defendant was in possession of land belonging to a party not represented in the Colony : Hence our interference. We acted upon the best information we could obtain ; the facts were of old date and difficult to be obtained.

JUDGMENT :

The objection taken to the validity of the proceedings in this case when closely examined are not very formidable.

There is undoubtly in the preliminary procedure before the Action, itself, came into Court, a misstatement to the effect that Rué was out of the Colony without being represented here, while it subsequently was made manifest by the production of authentic documents that he had died in Mauritius many years ago and had bequeathed the whole of his property to certain relatives in France. But in the suit itself the averments of the Curator are strictly in conformity with the actual facts as now established. It must be borne in mind that there is no doubt as to the indentity of the land in question or of the person Rué who was owner of it in his lifetime. There is a mere misdescription as to Rué in the out set of the proceedings, but no real or substantial discrepency or inconsistency of averment actually exists as to the material basis on which the case truly stand.

We are of opinion, therefore, that the objections now urged by the Defendant will be properly met by amending the erroneous averment and the case will proceed to its issue in the usual way ; all questions of costs, in the meantime, reserved.

BANKRUPTCY COURT.

—

BANKRUPTCY,— INVENTORY,—ABSENCE AND REMAKING OF BOOKS,— PURCHASE MADE DURING PROSECUTION BEFORE DISTRICT COURT, — UNDUE PREFERENCE IN PAYMENT,—MOTION FOR CERTIFICATE REFUSED.

In Re : BANRRUPTCY C**.

Before

His Honor Mr. JUSTICE N. G. BESTEL.
Commissioner.

G, GUIBERT,—Of Counsel for Bankrupt.
J. PIGNÉGUY,—Attorney for samet

L. ROUILLARD,—Of Counsel for Assignees.
P. E. DE CHAZAL,—Attorney for same.

—

22nd February 1872.

I have to day to dispose of the Motion of G. GUIBERT, on behalf of the Bankrupt C**, for a Certificate opposed by L. ROUILLARD on behalf of the Assignees.

Several grounds were urged against that motion, (viz :) The insolvency of Bankrupt, when entering in trade on his return to Mauritius from Europe where he had contracted a very large debt still unpaid, and at a time when he was largely indebted to G** Brothers in the island, who are still Bankrupt's creditors.

2o. Absence of inventory, and 3o. The want of properly kept books which had led to his inability of giving to the Assignees the information required by them for the right comprehension of the management of his affairs, 4o. His purchases from C**. whilst he was being sued before the District Court for the payment of a small sum, say £ 58, due by him to one D**. 5o. Payment made to E**. M**. & Co. and to C**. D**. & Co. of large sums of monies due to certain European creditors by preference to his creditors in this Colony.

G. GUIBERT met those objections not by denying the facts stated, but by attempting to shew that the circumstances referred to in no wise constituted that want of good faith which was necessary to warrant the refusal of a certificate to Bankrupt. That C** had been unfortunate in his Commercial dealings, but that his miscarriage as a trader was due to circumstances independent of his will, which might be traced back to the late

American war and its long continuance which has caused a considerable rise in the price of Calico goods in which the Bankrupt was in the habit of dealing. The then high prices naturally diminished the consumption of articles which met with such a ready sale, previous to this rise in the price, consequential upon the long duration of that war.

All this may be very true, but in no wise accounts for the absence of yearly inventory required by Our Colonial Law, and of the books which the same law requires should be kept so as to enable both the trader or his creditors, at any given moment, to ascertain the true pecuniary position of the trader who might be in embarassed circumstances at any time.

The Bankrupt had asked of the Assignees, who cheerfully assented to it, the favor of making up his books afresh, by doing which he expected to satisfy the assignees and the Court as to his good faith. Ample time was allowed him for that purpose.—But his labor was unattended with the desired affect. The remade books were just as obscure as the originals.

The memory of the Bankrupt upon which he had so much to draw by reason of the irregular manner in which his books had been kept originally, proved so unfaithful that he was unable to enlighten the mind of the assignees on the several points which he had been called upon to clear up.

The law has made it obligatory upon every trader that he do keep books.

But it is not sufficient that there should be books "they must be properly kept, and ba- "lanced from time to time, so that *at any* "*time* the real state of the trader's affairs "may at once appear." (In re *Smart* 1. FONBLANQUE *Bankruptcy* Cases 14 quoted in SHELFORD *Bankrupt laws*, Sec. 198 page 399 § 2.)

Further, the Bankrupt says: "I have no "*cash book*. Notwithstanding the omission "of the books and in the *absence of a Cash* "*book*, with the order of the Court I will do "my utmost to make up my books."—With the assent of the Assignees the order was given, but as already observed in spite of all the Bankrupt's efforts and the best will of the assignees to ascertain the true state of Bankrupt's affairs on his own account and also of his creditors, neither the Bankrupt nor the Assignees have eitherto been able to make themselves acquainted with the true state of the affairs of the Bankrupt who must therefore bear the natural consequences of his departure from the requirements of the law, vizt: of being refused the certificate prayed for (see SHELFORD's *Bankrupt Laws*, Sec: 198 page 399 § 2. Certificate refused accordingly.

BAIL COURT.

—

ATTACHMENT OF MONIES,—SUMMONS FOR VALIDITY THEREOF,—GARNISHEE,—HIS AFFIRMATIVE DECLARATION UPON OATH,—SUIT OR ACTION UNDER ORD: 34 OF 1852, ART. 60,—APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE.

An appeal from a Judgment of District Magistrate will lie for matters other than those termed Actions or Suit in Ord: 34 of 1852, Art. 60, such, for instance, as a motion in validity for attachment of monies.

No appeal will lie against a Judgment of District Magistrate, consequent upon a Garnishee's declaration made upon oath before such Magistrate, when no explanations had been asked from such garnishee nor any documents produced tending to disprove the allegations put forward by him.

—

WIDOW ALIPHON,—Appellant.

versus

WIDOW & HEIRS ROBERT & ORS,—[Respondents.

—

Before

His Honor Sir C. FARQUHAR SHAND, KNT. Chief Judge.

—

C. M. CAMPBELL,—Of Counsel for Appellant.
F. SIMONET,—Attorney for same.

H. GALÉA,—Of Counsel for Respondents.
E. DUVIVIER,—Attorney for same.

—

22nd February 1872

The Appellant being creditor of the Widow and heirs Robert, by "Bon" for $225, dated 18th May 1870, attached in the hands of the Oriental Bank, by Order of the Junior Dis-

trict Magistrate of Port Louis, all sums of money and other property whatsoever which might be owing, on whatever account, to their debtors by the Bank. The Garnishee being duly summoned to make the declaration of the sums due by him to the party seized, deposed by his admitted representative, as follows : I am an Accountant of the Bank ; we have no monies in the Bank belonging to the Defendants. On the 16th October there were monies in the Bank, in the name of Albert Robert, which the Bank knew belonged to Mrs. Canette ; the amount was $400. The money was paid on a Judge's Order.

The payment was made after the receipt of the present attachment."

The Appellant moved that the Attachment should be validated ; but the Magistrate dismissed the Summons, with costs.

Widow Aliphon appealed. Messrs. CAMPBELL and GALÉA were heard for the parties.

JUDGMENT :

A preliminary objection which has been stated to the competency of the appeal, viz : that it is inadmissible under Art. 60 of the District Court Ordinance of 1852, the proceedings in question here not being " a suit or Action," is I think too narrow and technical and must be repelled.

On the merits, I am of opinion that the Judgment of the Magistrate was right, as the case stood upon the oath of the Garnishee. Wheter if explanations had been asked by the parties and documents had been produced the case might not have assumed a somewhat different aspect, it is impossible to say, as nothing of this kind was done. The Garnishee stated that the Bank had no funds belonging to the Defendants ; that the money in the Bank, tho' in the name of Robert, belonged to another party. The oath must be taken as a whole and in the situation in which the case was left by the parties themselves with which the Court has now to deal : that oath is conclusive :

Appeal dismissed, with costs.

SUPREME COURT.

ATTRIBUTION OF SALE-PRICE — ORIGINAL PURCHASER,—PERSONAL CREDITOR,—SET-OFF,—" TIERCE-OPPOSITION, "— APPEAL FROM A JUDGMENT OF THE MASTER.

A party not called to share in the attribution of the sale-price of an immoveable property, he not being an inscribed creditor on the said property, cannot avail himself of the advantage of the " Tierce-opposition " in order to disturb the said Judgment of attribution ; specially when such party's claim has long since been extinguished by set-off and compensation. The same inability affects a personal creditor of the original purchaser.

BOLGERD & ors,—Appellants.

versus

LAHAUSSE LALOUVIÈRE & ors,—Respondents.

Before

His Honor SIR C. F. SHAND, KNIGHT, CHIEF JUDGE and
His Honor JUSTICE N. G. BESTEL.

C. BOLGERD appearing in person.
J. H. ACKROYD,—Attorney for Appellants.

G. GUIBERT,—Of Counsel for Respondents.
V. G. DUCRAY,—Attorney for same.

22nd February 1872.

This was an appeal from a Judgment of the Master, dated 12th September 1871, by which he dismissed the application of Julia Bolgerd & Charles Bolgerd the now appellants in the matter of the " Tierce-opposition " by them to a Judgment of attribution of the sale-price of a property situate in Port Louis, at the place called " Les Cassis " known by the name of " Belle Rôse, " sold by licitation by the heirs and representatives of the late Ernest Brouard and awarded to Alfred Lahausse La Louvière ; the said Judgment dated the 19th September 1870.

The Judgment of the Master was in the following terms :

" Whereas the " Tierce-opposition " to a Judgment is not opened to all parties who may complain of being aggrieved thereby, but to such persons only as ought to have been made parties thereto ;

Whereas no other parties ought to have been called to share in the attribution of the sale price of the property " Belle Rose," but

those having an inscribed claim upon the said property ;

Whereas Julia Bolgerd and Charles Bolgerd, as representatives of the late Charles Bolgerd the wife, have no inscription, either of privilège or of mortgage upon " Belle Rose ;"

Whereas the original vendor's privilege of Charles Bolgerd the wife has long since been extinguished by a set-off and compensation with the late Charles Dorothée Savy père, the original purchaser of " Belle Rose," as proved by two Judgments of the Supreme Court, the first one between Charles Dorothée Savy and Bolgerd & wife, dated the 25th of August 1853, Record No. 235, affirming a Report of the Master, dated the 21st of June same year, in which figures the said privilege of Bolgerd the wife, and the second between the heirs of the late Charles Dorothée Savy and Bolgerd the wife, dated the 19th of December 1854, Record No. 1021, affirming another final Report of the Master, dated the 24th November same year, whereby a final balance of £ 24.16.6 was found against Charles Bolgerd the wife, together with £ 38.12.11 for costs ;

Whereas the Judgment of the 30th of November 1855 delivered against the late Napoléon Savy is quite stranger to, and has nothing to do with the present case & the claim of Bolgerd the wife ;

Whereas supposing that the said Vendor's privilege has not been settled by way of set-off and compensation, as aforesaid, Bolgerd the wife would remain a personal creditor of the heirs Savy and as such would have no claim upon the sale-price of " Belle Rose" and no right to be called to the Distribution of the sale-price thereof ;

Whereas the proceedings taken by Alfred Lahausse La Louvière for the Distribution of the said sale-price are regular and in conformity to the law in such matter made and provided, I dismiss the application of Julia Bolgerd and Charles Bolgerd, with costs against them."

In the appeal the Appellant Bolgerd was heard in person at great length against the Master's Judgment ; but after giving every attention in our power to the case, we see no reason whatever for disturbing the Judgment of the Master. That Judgment is accordingly affirmed and the appeal is dismissed with costs.

BAIL COURT.

—

JURISDICTION OF THE COURT,—JUDGES AT CHAMBERS,—MUNICIPAL TAXES,--MAYOR'S WARRANT, — SET-OFF, — APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,— ORDINANCES 24 OF 1855, 21 OF 1851, ARTS. 45, 46, 51, AND 34 OF 1852.

The Courts have no jurisdiction to enforce the recovery of the Municipal taxes, which is done in a summary manner and upon the execution of the Mayor's Warrant of Levy ; but they will, however, interfere when, for instance the party levied on sets up a claim of set-off.

—

F. BOLGERD,—Appellant.

versus

MAYOR & CORPORATION OF PORT-LOUIS,—Respondents.

—

Before

His Honor Sir C. FARQUHAR SHAND, KNT. Chief Judge.

—

C. M. CAMPBELL,—Of Counsel for Appellant.
F. SIMMONT,—Attorney for same.

HON. V. NAZ,—Of Council for Respondant.
J. PIGNÉGUY,—Attorney for same.

—

22nd February 1872.

This was an Appeal from a Judgment of the Senior District Magistrate of Port Louis, condemning the Appellant in payment of the sum of $ 244.50c. for taxes on property within the town, as per roll of particulars served upon the Defendant, extending over the time from the year 1867 to 1871.

A number of objections were taken by the Defendant, now Appellant, in the Court below, but the Magistrate overruled them all and gave Judgment for the Corporation, with costs.

The Defendant appealed. MR. CAMPBELL on her behalf confined his argument to the objection to the Jurisdiction of the District Court. The wrong course, he maintained, has

been followed here.'—Formerly to make warrants for Town-taxes in arrear executory, in other words to put them to execution, recourse was had to the Court of First Instance (Ord: 18 of 1843 §§ 28—37,) and the present application, under the existing practice and constitution of the Courts, should have gone to the Judge at Chambers. (Ord: 24 of 1855) The Corporation has very large and general powers for collecting its revenues. (Ord: 21 1851 §§ 45.46,) but it was unnecessary and in law incompetent to go to a Court at all, as the Mayor's warrant for taxes is itself declared to be executory (Art. 50 of Ord: 21 of 1851.)

HON. NAZ.—*Contrà.* The Defendant advised by her father, Mr. Bolgerd, has contrived, for more than 20 years, to escape all payment of taxes for the premises in question. It was always maintained that she had under the Municipal Ordinances, a set-off for half the expense of making a foot-path (trottoir) opposite her property in the town; but she would never try her right in any Court of law to insist in that claim of set-off. In this way she completely defeated our right to levy the tax. At last we brought her into the District Court, where all questions between the parties can be adjusted legally, and she objects to the Jurisdiction.

THE COURT.

By Ord: 34 of 1852, all Civil cases, with certain special and enumerated exceptions, may be brought before the District Magistrate when the sum in dispute shall not exeeed the sum of £50. This is, therefore, the common usual and available Jurisdiction open to parties in all disputes where resort to a Court is required in matters of comparatively small pecuniary value. In ordinary cases there is in this Colony, as elsewhere, a more summary way for recovering payment of public-taxes than by resorting to Courts of law: but from the attitude taken up by the Appellant, here, the usual summary method was closed against the Respondents; at least they had for a series of years been met with the plea of an alleged compensatory claim but which the Appellant never brought to trial. I am, therefore, of opinion that in the actual position of matters, a resort to what we may call the common-law-Jurisdiction of the Colony, open to suitors generally in those small cases, was competent and indeed expedient on the part of the Municipality. They gave the Appellant an opportunity which, for obvious reasons, she whould not make for herself of having any counter claim she might put forward disposed of and the amount due for her taxes, if any, ascertained. The appeal is therefore dismissed, with costs.

BAIL COURT.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—FALSE AND MALICIOUS DENUNCIATION IN WRITING,—ARTS. 297 AND 299 COLONIAL PENAL CODE,— INFORMATION, —OMISSION BY ACCUSER OF INITIALING ACCUSED NAME,—GENERAL GROUND OF APPEAL.

An information lodged against a party before a District Magistrate, comes up to the Description of "writing" mentioned in Art. 297 of the Colonial Penal Code.

The general ground of appeal that "the conviction is bad in law," is unsufficient to cover any special plea not pleaded below and not entered as a ground of appeal.

Although an accuser had not initialed, in the margin of the information laid by him, the name of the party accused, the mere appearance of such accuser to prosecute the charge renders him liable to a criminal action founded upon Art. 297 of the Colonial Penal Code.

RAMSAMACHETTY,—Appellant

versus

THE QUEEN,—Respondent.

Before:

His Honor MR. JUSTICE GORRIE.

E. PELLEREAU,—Of Counsel for Appellant.
J. ACKROYD,—Attorney for same.

THE SUBS. PROC. & ADV. GEN,—Of Counsel for the Crown.
J. BOUCHET,—Attorney for same.

5th March 1872.

In this case E. PELLEREAU for the Appellant appeals against the conviction of his client:

1o. Because Art: 297 of the Penal Code under which his client is charged, when construed along with Art: 299, does not apply to writings produced before a Court of Justice.

This plea was not pleaded before the District Magistrate nor judged of by him, nor entered as a reason of appeal must therefore be dismissed. The learned counsel contended that it was covered by his general ground of appeal that the Conviction was bad in law.—If we were to entertain such an argument it is very clear that reasons of appeal would be so framed henceforth as to conceal the grounds as much as possible, and would lead to great abuses in practice.

We cannot, therefore, allow this reason of appeal such as it is to be pleaded, against the conviction.

2. We do not consider the other grounds of appeal tenable; the Chief of them is that a marginal note containing the name of the person denounced under Art. 297, was not signed by the Accuser before the Warrant was issued, and was only initialed by the Magistrate in the course of the proceedings which followed.—We have no doubt whatever from what passed that the marginal note was suggested by the Magistrate for greater precision and accuracy, that it was insisted by the Accuser or by some one acting on his behalf and with his authority and that the omission of the initialing or signing of the marginal note which was an omission of the appellant himself was covered in the fullest possible manner by the appellant appearing to prosecute upon the charge of larceny, the person named in the marginal note. The Information as it stands comes fully up to the description of writing against one or more individuals in Art: 297 of the Penal Code. The appeal must therefore be dismissed, with costs.

SUPREME COURT.

—

SUMMONS TO SHEW CAUSE,—AMENDMENT OF PLEA,—ADDUCTION OF WRITTEN EVIDENCE,—ALLEGATION OF FRAUD,—INSCRIPTIO FALSI,—NOTARIAL ACQUITTANCE,—C. C. ARTS. 1115, 1319, 1341, 1347, 1348, —CIV. C. PROC. ART. 214.

Even when a Plaintiff has not attacked a notarial deed by way of an Inscriptio falsi, written evidence may be adduced against the purport of such deed, when fraudulent practices are alleged to have been used by one of the parties to such deed, subsequently to its completion, and when such written evidence is offered in support of this allegation.

—

BOLGERD,—Plaintiff.

versus

COLONIAL SECRETARY,—Defendant.

—

Before

His Honor SIR C. FARQUHAR SHAND, KNT., Chief Judge, and
His Honor N. G. BESTEL.

—

G. GUIBERT,—Of Counsel for Plaintiff.
F. SIMONET,—Attorney for same.

Hon. E. LECLÉZIO,—Of Counsel for Defendant.
J. BOUCHET,—Attorney for same.

—

7th February 1872.

By Judgment of the 18th July, this Court decided that the HONORABLE THE COLONIAL SECRETARY of the Government of Mauritius, had mistaken his remedy in resorting to a Declaration for the purpose of setting aside a notarial acquittance under date of the 22nd January 1846, when he should have had recourse to an *inscriptio falsi* to that effect. The Action was accordingly dismissed with costs, unless Plaintiff would elect to be nonsuited with costs.

The Colonial Secretary thereupon, elected to be nonsuited with costs.

On the 28th of August last, a Summons was applied for and obtained at Chambers by the Colonial Secretary, calling upon Bolgerd and co-suitor, to shew cause why the said Defendant's (Colonial Secretary) pleas, on the original Action, should not be amended by adding thereto the plea set out in the said Summons, and to adduce evidence in support of such plea.

On the return day of the said Summons, parties appeared before the Judge at Chambers and were referred to the Court to be heard on the 14th September last, on the propriety of the amendment applied for. Parties were heard and on the 7th October last, the Court allowed the amendment prayed for with leave to the Colonial Secretary to adduce evidence in support of such additional plea.

The cause on the amended pleadings came on for hearing on the 7th December last.

G. GUIBERT, for Bolgerd, then said: the Colonial Secretary can derive no advantage whatever from his amended plea. The allegation of fraud introduced into the case by means of the additional plea allowed, is insufficient to relieve him from the necessity of having recourse to an *inscriptio falsi* the only remedy warranted in law for the purpose of setting aside the notarial acquittance of the 22nd January 1846.

The positive enactment of Art. 1341 C. C. is " qu'il n'est reçu aucune preuve *par témoins* contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de 150 francs," except in the cases provided for by Art. 1347 and 1348, C C. The case of the Colonial Secretary is not within either of these exceptions. If the facts stated in the deed and as to which the Notary was a competent witness, (viz:) the payment made by Bolgerd, in specie, be not false, no fraud can be imputed to Bolgerd. If false they cannot be shaken but by an *inscriptio falsi*.—(TOULLIER Vol. 8, No. 146; ZACHARIÆ Vol. 6, page 367. *Dreu v. Ducray* (PISTON'S *Reports* 1868, page 12,) and the Judgment given between parties to the present Action of the 18th July 1871, dismissing the Action of the Colonial Secretary for not having challenged the accuracy of the notarial deed of the 22nd January 1846; LAROMBIÈRE, Vol. 5, page 145.) The *inscriptio falsi* is the only legal way and means to be resorted to by which the Colonial Secretary can render available the alleged written evidence which, it is said, is to establish in a triumphant manner the error complained of and thus establish the bad faith of Bolgerd, if not at the very moment when the notarial acquittance was drawn up and signed, at least subsequently to the signing of the acquittance by the then Colonial Secretary.

HON. E. LECLÉZIO argued: I fully concur in the correctness of the law laid down by GUIBERT. Art. 1319 C. C. on the one hand, whilst informing us that " l'acte authentique fait pleine foi de la convention qu'il renferme ".....goes on tracing out the remedy, if need be, for shaking the credit it has attached to authentic instruments and mentions " la plainte en faux principal, et l'Incription de faux incident Civil, Art. 214, C. C. P. " On the other hand Art. 1341 C. C. which is no less imperative must be obeyed to the very letter, wherever and whenever applicable to the cases laid before the Court.

It forbids the adduction of oral evidence against and beyond the contents of a deed, of any thing alleged to have been said before pending and after such deed. This rule is not however without its exceptions as shewn by the enactment of Art. 1347 and 1348, C. C., and I undertake to shew that the case entrusted to me comes within the letter and spirit of the exceptions of Art. 1347, C. C.— I say that an *inscriptio falsi* is not the only legal mode of quarrelling the various statements of an authentic deed, whenever recourse is to be had not to parol but to written evidence, as in this case.

The evidence justly prohibited by Art. 1341 C. C. is parol evidence of facts " contre et outre le contenu aux actes " or parol evidence of "ce qui serait allégué *avoir été dit avant* lors ou depuis le actes." The evidence I have to adduce is not of facts against and beyond the content of the notarial deed, nor is it parol evidence of anything said before, at the time of and since the stipulations of the authentic act between parties. My evidence is *written* evidence emanating from Bolgerd, rendering probable my allegation of the incorrectness of the discharge stated in the notarial instrument, which evidence is permitted and rightly so, by Art. 1347 C. C., which says: " Les règles ci-dessus" including the one laid down in Art. 1341, C. C., " reçoivent exception lorsqu'il existe un commencement de preuve par écrit. On appelle ainsi tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué." Besides I do not charge Bolgerd with any fraudulent manœuvres for the obtention of the notarial discharge given him. All the parties were then of good faith, including even Bolgerd. The proof of his then good faith is shewn by the fact of his written admission of a certain debt on his part to Government, subsequently to the discharge mentioned in the notarial deed. Unable however to prevail with the latter to accept the figure proposed by him, then only it was, and not before, that the thought of defrauding Government presented itself to the mind of Bolgerd, who the better to succeed in his then projected fraud, allowed things to lie dormant for a considerable lapse of time, during which time the public officers who might have thrown light on the issue between parties have either departed this life, or left the service. Feeling then almost sure of success, he made bold to deny his debt, and pleaded discharge on the strength of the authentic act now produced. Fortunately for the Government the written admission and correspondence of Bolgerd have not disappeared and have been safely preserved and are now produced against him. Further, it should be borne in mind that the "Dol" or fraud posterior to a contract, cannot be proved otherwise than by writing. (See BEDARRIDE, *Traité du Dol et de la Fraude*, Vol. 1, No. 241, last par. and the authorities quoted by that writer.)

JUDGMENT.

The Court, in conformity with Article 1319 C. C., has laid down in an interlocutory Judgment between the parties to this suit, the general rule that an *inscriptio falsi* was the proper form of Action to be adopted for shaking the full credit attached by law to all authentic instruments. But the demand as to which the objection was then taken alleged no fraud on the part of Bolgerd, either before or at the time of and posterior to the signatures of the discharge. Whereas the amended Declaration sets forth fraud, at a date subsequent to the notarial discharge. It is now sought to prove such allegation by writings emanating from Bolgerd. Are we to shut out the proof demanded on the pretext of the Government having mistaken the proper form of Action and thus afford encouragement and hold out a premium to bad faith ? Very fortunately we are not compelled by law to do so, for it is now a settled point that " le dol " et la fraude allégués contre un acte peuvent " être prouvés par témoins, &c., et cela encore " qu'il s'agisse d'acte authentique ; il n'est " pas nécessaire pour detruire la foi due à " l'acte de prendre la voie de l'*Inscription*." Art. 1116, C. C. Note 10. GILBERT, and the authorities.

Moreover, the reasons of Art. 1341 C. C. for prohibiting parol evidence of any allegation against and beyond the contents of an authentic instrument, and of any allegations of things said before, at the time of, and since the drawing up of such instrument, are not to be met with in the case before us. The application is not for parol, but for written evidence which is not accompanied with the same dangers as parol evidence.

We shall, and do, therefore, overrule Bolgerd's objection to the admission of the tendered written evidence, and order parties to proceed on the merits.

BAIL COURT.

—

" COMMODAT OR PRÊT A USAGE,"—ORAL EVIDENCE,—" DOL " (FRAUD),—" MISE EN DEMEURE, "—APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—C. C. ARTICLES 1341, 1342, 1346, 1139 AND SEQ.,—COSTS.

The strict rules of written proof are not applicable to a case of mere handing over of the use of her jewels by a party to another, for a festive occasion to last a few hours ; such friendly acts not being usually established by written contract. Oral proof admitted, accordingly, to prove the loan.

—

AYACANOO,—Appellant

versus

WIDOW PARPADY,—Respondent.

—

Before :

His Honor SIR C. FARQUHAR SHAND, Knt.
Chief Judge.

—

W. NEWTON,—Of Counsel for Appellant.
M. SAUZIER,—Attorney for same.

L. COX,—Of Counsel for Respondent.
J. BOUCHET,—Attorney for same.

—

19*th* *March* 1872.

This was an appeal from a Judgment of the Senior District Magistrate of Port Louis. The Respondent, Widow Parpady, had called the Appellant before the Court below on a complaint setting forth that she claimed from Ayacanou, of the District of Savane, at the place called Souillac, trader, Defendant in this suit, the restitution of the undermentioned jewels belonging to her and lent by the said plaintiff to the said Defendant on or about the month of..... one thousand eight hundred and seventy :

" Vizt. :

" One black silk necklace containing 373 " small gold beads ; 2o. one gold necklace, " four feet in length, having a gold neck pen- " dant marked M. S. in filagree work, two " inches in length attatched thereto and se- " cured at either end by two large gold beads ; " and in default of restitution on the part of " defendant, of the said jewels, plaintiff claims " the sum of one hundred and seventy two " dollars, being the value of the said jewels, " with costs."

At a sitting of the Court, on the 8th December last, after an amendment asked for by the plaint had been allowed, an objection being taken by the defendant that oral evidence in support of the Plaint was not admissible under Article 1341 of the Civil Code, the Judge overruled the objection stating that he pro-

ceeded on the ground " that, the gist of the " case comprehended *dol* and such a grievance "' can be proved by oral evidence." The farther hearing of the case was delayed *ex-officio* that counsel might be procured for the plaintiff. On the 12th December, the case was resumed in Court, parties on both sides, represented by counsel; after an amendment of the Plaint had been allowed by the insertion of the word (' October," the counsel for the Defendant contended that the case ought to have been preceded by a "mise en demeure" under Article 1139 and seq: C. C. as the suit was one of damages.

This objection was overruled; the Defendant, then, pleaded not indebted, and parole evidence being tendered, it was again contended on behalf of the Defendant that such evidence could not be allowed, but the Judge after taking time to consider, decided that oral evidence was admissable. The Defendant appealed.

W. NEWTON for Appellant, quoted Articles 1139, 1142 and 1146 of the Civil Code in support of his plea that there ought to have been " a mise en demeure." 2o. He maintained that the Contract of " Commodat " or " Prêt à usage " is not provable by witnesses. TROPLONG and other authorities—" SIREY *Codes annotés* " Art. 1875. The amendments allowed by the Magistrate have not, in point of fact, been made.

L. Cox. *Contrà*. This is not an action of damages, so no "mise en demeure" was required. 2o. Commodat is a gratuitous Contract always provable by witnesses. It differs from the other Contracts of lease; agency and deposit where the law in so many words expressly requires writing. S. 6. 2. 963. The old law of France before the Code was in my favor and it has not been changed by any positive enactment.

The jewels were lent for a marriage party; besides it is now too late to urge the plea of the inadmissibility of oral evidence. The amendments can still be competently made upon the record.

THE COURT.

This case has got somewhat out of shape. The Judgment of 8th December allowing parol evidence was final in the Court below. It was too late to re-open the question as was subsequently done. I am of opinion that in the " espèce " here before us, the Magistrate was right in his ruling—The plaintiff alleges that she will establish a mere handing-over of the use of her Jewels to a neighbor for a festive occasion lasting a few hours. Such friendly and neighborly acts are not established by written Contracts. It is, speaking morally at least, almost impossible that they should be so. The strict rules of written proof are not applicable to such cases, the Plaintiff's allegation (her proof is quite another thing) is inconsistent with the Defendant ever having had the property of the Jewels, or even such a possession of them as would ground a claim of property. The possession averred was temporary and precarious and in a title irreconciliable with a claim of property by the defendant. This is not a suit in damages requiring a " mise en demeure " even were such a plea still open to the Defendant. The case is remitted to the Court below to allow parol proof of the Plaint, the amendments already allowed to be added to the Plaint, if this has not already been done. The Judge, below, to have power to dispose of all questions of costs including those in this appeal.

BAIL COURT.

—

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE, — PENALTY, — MOTION IN MITIGATION.—ORD. 35 OF 1852 § 123.

—

Refusal by the Court to reduce the amount of Penalty awarded by the District Magistrate against one of the Appellants.

—

A. THOMASSE & AUGUSTIN,—
Appellants.

versus.

THE QUEEN,—Respondent.

—

Before:

His Honor Sir C. FARQUHAR SHAND, Kt., Chief Judge.

—

L. Cox,—Of Counsel for Appellants.
A. PITOT,—Attorney for same.

G. ELLIS,—Subs. Proc. Genl., Of Counsel for Respondent.
J. BOUCHET,—Attorney for same.

19*th March* 1872.

—

This was an appeal from a sentence of the District Magistrate of Plaines Wilhems in a case of wounds and blows alleged to have been inflicted by the six parties accused, upon the persons of two other individuals, in the course of a scuffle upon the highway. The Magistrate found the charge established against two of the accused, viz: Alexandre Thomasse and Augustin and sentenced the former to ten months imprisonment with labor, and the latter to 6 weeks imprisonment with labor. The case against the other prisoners was dismissed. The persons convicted appealed.

The Substitute Procureur General stated that he was not in a position to support the conviction against the accused Thomasse and that he gave up the case against him.

L.Cox for the other appellant submitted that the punishment to which his client had been condemned by the Magistrate, was too heavy, looking at all the circumstances of the case and moved that it should be mitigated under the power to do so allowed by Law to the Judge hearing the appeal: Ord: 35 of 1852 § 123.

THE COURT.

The Judgment against the prisoner Thomasse is quashed. I have looked carefully thro' the proceedings in the Court below, and I don't see any reason for diminishing the punishment of the prisoner Augustin. So far, therefore, as he is concerned, the appeal is dismissed, with costs.

BAIL COURT.

Before

His Honor JUSTICE GORRIE.

—

E. PELLEREAU,—Of Counsel for Appellant.
J. ACKROYD,—Attorney for same.

A. G. ELLIS,—Acting Sub. Proc. Genl. of Counsel for Respondent.
J. BOUCHET,—Attorney for same.

—

5th March 1872.

PERJURY—RECORD— COURT OF RECORD,—MAGISTRATE'S NOTES, — WRITTEN EVIDENCE OF DEPOSITION BY ACCUSED—ORD. 35 OF 1852 § 105, 106 AND 119—APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE.

The Magistrate must, himself, take down the Evidence in Criminal Trials before him, and such Evidence must be produced and proved when it is proposed to make use of them in an other criminal trial.

CHINATAMBY—Appellant.

versus

QUEEN—Respondent.

In this case, on a trial for perjury, an objection was taken by Pellereau for the accused, before the District Magistrate of Savanne, that no legal evidence was produced of the deposition by the accused in the trial on which the charge of perjury arose, or at least that the best evidence of that deposition was not produced. The Magistrate decided against the objection, in an elaborate Judgment which the Court has carefully considered, and the present appeal has been taken by the accused, against the ruling in point of law.

In the trial from which the charge of perjury has arisen, the Magistrate, as usual, took down in writing the evidence, as required by §§ 105 and 106 of the Ordinance 35 of 1852, but in the trial for perjury that evidence neither formed part of the Record, nor was produced, nor proved by the Magistrate; the evidence of the perjury, being left to depend on the oral testimony of the clerk and the Interpreter of the District Court, who were present.

In the case of *Mamet vs. the Queen* (PISTON'S *Report*, 1868 page 23) it was decided that the evidence was to be taken down by the Magistrate, not by the clerk, and that accordingly in a trial for perjury, notes of evidence, taken by the clerk, were not allowed.

The Ordinance seems, indeed, to be perfectly clear on this point, for Arts. 105 and 106 set forth categorically that the evidence in support of the charge is to be taken down by the Magistrate, in writing, and that the Magistrate is to set down the evidence for the accused in like-manner as is prescribed with reference to the evidence against him.

These provisions imply, however, something more than that the Magistrate and not the clerk shall take down the evidence. They make a written Record of the evidence a matter of legal obligation in a criminal trial before the District Magistrates of Mauritius. When an appeal is entered against a convic-

tion the evidence, along with other proceedings, is by § 123 to be revised by the judges. It would be difficult to understand how the appellate jurisdiction of the Court could otherwise be exercised, as by another section no new evidence is to be taken in the cause.

It is not necessary to set forth the evidence at length in the conviction, but by § 119 the principal facts of the case upon which the decision is based, are to be expressly alleged if an appeal is taken.

The Magistrate or his clerk sends up a copy of the evidence taken down by him as part of the proceedings in the cause; a full copy of the Minutes, documents, and proceedings being forwarded to the Registrar of the Supreme Court, authenticated by the Seal of the District Court.

It has been argued that appeals only take place in cases of conviction, and that special provision is made in the Ordinance for these cases; but there are no provisions showing how the evidence is to be dealt with where there was an acquittal as was the case here, in the original trial out of which the perjury arose; that we must accordingly refer to the English practice whence the term "record" and "Courts of Record" have been taken to ascertain what is meant by these expressions, and to know what obligations, if any, they impose on the Magistrate and clerk in the way of making up and preserving records of trials for use in subsequent trials or otherwise.

It is deduced by the District Magistrate from the authorities quoted by him and maintained before us by the learned Substitute Procureur General, in support of the Judgment, that the Magistrate's notes of evidence in no case form part of the Record, which really consists simply of minutes showing that a trial had taken place and its result; and that those minutes authenticated by the Clerk and the seal of the Court are, as regards Courts of Record, sufficient attestation of the facts without further evidence. In a trial for perjury, it is contended that when such a record of the former trial is put in so authenticated, that proved the facts set forth of the former trial, the proceedings adopted and the acquittal or conviction; but that it is neither necessary nor competent, for the Clerk, to embrace in his Record the notes of evidence of the Magistrate.

In support of these views great weight was laid upon a decision by Mr. JUSTICE COLIN, in the Bail Court, in the case of *Hassen v. the Queen*, reported in PISTON'S *Report*, 1870, wherein he held that in a case of perjury, it was not sufficient to produce the notes of evidence taken by the District Magistrate in the first trial, but that they must be proved. How they were to be proved or whether the notes when proved could be used for any other purpose than to refresh the memory of the witness, was not decided.

The District Magistrate contends that the only way of proving, as the evidence does not profess to be depositions signed by the persons who made them, is to call the Magistrate and that when this is done, the evidence becomes in fact oral, the notes being used to refresh the memory.

We do not think that it is necessary, for the decision of this case, to go into this point.

It is sufficient that we give effect to the Judgment of Mr. JUSTICE COLIN which was concurred in by the other Judges, that in Criminal trials where the evidence taken by the District Magistrate, in a former trial, is put in, it must be proved; the logical result of such a conclusion, according to the contention of the Respondent, is that the evidence so taken, does not form part of the Record, as the essential principle of Courts of Records, is that matters of Record properly authenticated prove themselves. It is possible that had the Ordinance permitted the evidence to be taken down by the Clerk and preserved by him, and when it was embodied in his narrative of the proceedings of the trial, and authenticated in the usual manner, that the Judgment in his case of *Hassen* would have been different. The difficulty has arisen because the Ordinance, most wisely and properly as we think, has required of the Magistrate, himself, the duty of taking down the evidence, and left to the Clerk that of preserving a record of the proceedings of the Court.

As the matter stands, however, it is clear that the Magistrate must, himself, take down the evidence in Criminal trials before him, and that what he takes down must be proved when it is proposed to make use of it in another Criminal trial.

We now come to consider whether in the trial of the charge of perjury against the Appellant, it was not only competent, but necessary to produce the evidence so taken down by the Magistrate.

Both the cases of *Mamet* and *Hassen* show that it has been hitherto regarded as necessary. The Respondent, however, maintains the negative on the ground that the evidence by the decision of *Hassen* is not matter of legal Record, and when proved as he contends, it must be by the Magistrate, himself; the Ma-

gistrate becomes a witness in the cause, speaking of what he saw and heard, using his notes to refresh his memory, but holding no better position than any other witness who was present, except so far as the notes taken at the time may tend to render his evidence more reliable.

This argument was supported by a citation of authorities to shew that in England perjury was, in fact, proved by the oral testimony of those who were present at the trial and heard the evidence of the witness. Any other mode it was urged, would be highly prejudical to the accused, as the evidence taken down by the Magistrate is not signed by the witness, the Magistrate may make mistakes, and the accused might be thus held to have uttered words which he did not speak, and which he would have no power of testing by cross-examination.

This is to assume that the evidence taken down by the Magistrate, when proved, is not to be disputed, any more than a fact in the proceedings authenticated by the clerk and the seal of the Court. But without going so far, we may hold that as the law required the evidence to be taken down may be regarded as in general case, better proof than the loose recollections of bye-stander or even of the officials who are not bound to keep notes and that a trial of perjury could not, with due regard to the interests of justice properly take place without the record of the evidence in the possession of the Magistrate being produced.

We do not intend or desire to decide the point as to the exact legal value of such evidence or whether it can be controverted by oral testimony of others who were present, but we think, however, that the evidence is taken under such requirements and sanctions as to render its production essential in the trial of the charge of perjury arising out of the evidence so taken down and preserved. The evidence so taken is not in this Colony mere notes jotted down by the Judge as the case proceeds for the purpose of guiding him to a satisfactory result, and which he may take or not, or make long or short at his pleasure.

It is the "evidence" which the law requires him to take down and preserve. It may be true that the Ordinance only directly specifies one use to which the evidence is to be afterwards put, viz: to be revised by the Judges on appeal, but such a specification does not limit the use to which evidence so taken may be applied and if ever it can be advantageously used, otherwise it is when one of the witnesses giving the evidence, has been charged with perjury. And we think in all cases it must be so used as it forms a record of what was said, made at the time by the person selected by the law, as the most competent person for the purpose, and which whether it may form part of the testimonial Record of the cause, or not, is a Record of the evidence made under the requirements and sanctions of the law.

It may be inferior in value to depositions signed by the witness, but certainly it is better than the loose recollections either of the officials of the Court, or of indifferent persons who may have been present at the trial.

We give no opinion upon other points which have been incidentally raised in this case, but restricting our Judgment to this whether the evidence taken down by the Magistrate, in the first trial, should have been produced in the trial for perjury: we hold that it ought, and on this ground sustain the Appeal, and quash the conviction complained of.

BAIL COURT.

SABABADY,—Appellants.

versus

THE QUEEN,—Respondent.

5th March 1872.

For the reasons stated in the Judgment just delivered in the case of Chinatamby *v.* The Queen, we sustain the fourth reason of Appeal, and quash the conviction complained of.

BAIL COURT.

WATER ORDINANCE,—RIVERS & CANALS,—SYNDIC, JOINT SYNDIC OR GUARDIAN THEREOF,—"RIVERAIN,"—CONTRAVENTION,—PIPES & DIKES,—FINE,—APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—FORM OF SUCH APPEAL,—ORD. 35 OF 1863 ARTS. 14 AND 23.

The Syndic of a Canal, who has prosecuted a contravention to the laws of the Rivers and Canals Ordinance, before the District Court, is the proper and only party to be called as Respondent, on the appeal, and not the Crown.

ROUILLARD,—Appellant.

versus

QUEEN,—Respondent.

Before

His Honor Sir C. FARQUHAR SHAND, KNT. Chief Judge.

—

L. ROUILLARD,—Of Counsel for Appellant.
M. SAUZIER,—Attorney for same.

G. ELLIS SUBS. PROC. GEN. — Counsel for Respondent.
J. BOUCHET,—Attorney for same.

P. L. CHASTELLIER.—Of Cousel for E. Pitot.

—

19*th March* 1872.

This case arose out of an Information upon oath, presented on 6th October last to the District Magistrate of Pamplemousses, in the following terms.

" Charge of removing and altering a pipe " and placing a dike or construction in the " River. (Arts. 14 and 23 of Ord. No. 35 of " 1863.")

" Edouard Pitot, of Piton, in the District " of Pamplemousses, guardian of the canal of " Bois Rouge in the said District, maketh " oath and saith as follows:

" That on the 12th day of September or " thereabouts in the year of Our Lord one " thousand eight hundred and seventy one, " at Australia estate in the said District, one " Gustave Rouillard proprietor of the said " Estate, did by himself or by the Manager " of his said Estate or by the "employés" or " laborers thereof 1o. illegally and unlawfully " and without lawful authority, remove and " alter a pipe by which the waters of the Ri- " vière du Rempart were taken to his Sugar " house; and 2o. illegally and unlawfully " and without lawful authority place or cause " to be placed in the bed of the said river, at " the head of a canal dug by his orders or " those of his Manager, by his employés or " laborers and leading water to the spot where " he placed the pipe, a dike or construction " contrary to the provision of the said Ordin- " ance." Whereupon the said complainant " prayeth the Court that the accused be " brought before it and dealt with according " to law."

The Respondent was summoned to appear on the 18th October by a Notice served by an Usher, headed " Crown Side, Summons to party charged."

The Respondent attended on the day fixed. The Information was read over to him by the District Magistrate and he " pleaded not guilty." The case was postponed to the 30th October, when the plaintiff and a number of witnesses were examined on both sides.

The articles of the law which the defendant was accused of infringing were Arts: 14 and 23 of the water Ordinance No. 35 of 1863. They run in these terms.

" Art. XIV any person " who shall with- " out lawful authority, place, remove or alter, " any metal, stone, dam, or other aforesaid " work, shall be liable to a penalty not ex- " ceeding £ 50 sterling; and the same shall " be removed or restored to its proper condi- " tion, as the case may be, at his expense."

XXIII. All persons are forbidden, unless " with authority from the Executive Council, " to stop or change the course or level of any " River, Stream or run of water, being pub- " lic property; or to make or place in the " course thereof any dike, dam, basin or cons- " truction of any kind.

" Any one contravening this provision shall " incur a penalty not exceeding £50 sterling, " and shall restore the River or other aforesaid " run of water to its former state."

At the close of the case the Magistrate pronounced the following Judgment:

" With regard to the charge preferred " against Mr. Rouillard for having changed " the course of a stream known by the name " of " Ruisseau Janvier," no proofs having " been adduced that such change took place " through the fault of Mr. Rouillard or his " Manager, I shall dismiss the same."

" With regard to the second charge, consi- " dering, from the evidence adduced, that the " charge has been fully proved under Articles " 14 & 23 of Ordinance 35 of 1863, I ad- " judge and order the said Gustave Rouillard " to pay a fine of thirty pounds sterling, " with all costs."

The Respondent's counsel declared that he intends appealing against the conviction arrived at. His appeal was entered " The Queen vs. Gustave Rouillard" as against a " Summary couviction," and the reasons of appeal were subjoined in the usual form observed in Criminal appeals.

The case came on for hearing in the Bail Court, on 4th March last.

The SUBSTITUTE PROCUREUR GENERAL appeared but declined to take any part in the discussion as "the Crown had no interest in "the case."

L. ROUILLARD for the appellant and P. L. CHASTELLIER for the Respondent were heard at length.

THE COURT.

The point which has been anxiously argued by the parties is simply one of form, viz: as to the shape in which the present appeal has been brought before this Court.

The Respondent's Counsel has contended that the wrong party has been called, viz: the Crown, who has nothing to do with the case, while his client, the Syndic of the Canal, the original prosecutor and the only person interested on behalf of his constituents has not been brought into this Court, at all. The case, it is contended, is not a Criminal one, but merely a prosecution for a Civil penalty under a special law, commonly called "The water Ordinance."

On the other hand the Appellant contended that as no form of appeal was given in the Ordinance referred to, he was bound to follow the usual course of procedure.

That if the Crown would not support the Judgment of the Court below, the conviction must necessarily be quashed as in all such cases. Altho' the Syndic may be entitled to to the fine for behoof of the "Riverains," this does not alter the nature of the form of the appeal under Ord. 35 of 1852 more than in those cases where the Police or the "Caisse de Bienfaisance" had a share of the penalty. A River is a public not private property, and by § 62 of the Ordinance, the guardian is declared to have the same duties and the same protection as a Police man, but he cannot of himself execute the Judgment in his favor. The fine will, in the first instance, go to the Treasury. It appears to me that the present question is attended with some difficulty.

The matter of appeal is not regulated by any enactments in the water Ordinance, indeed it is not alluded to at all in that Law. For want of explicit directions there is no doubt that a person standing in the position of Rouillard and wishing to bring this Judgment of the District Magistrate under review must have found himself somewhat embarassed as to the form of his appeal. The proceedings, in some respects, as pointed out by the Appellant's Counsel, savour of a criminal pursuit; but when we look at the special provisions of the Ordinance, the enactments, in favor of the right and interest of the Syndic without interference or assistance from any quarter to prosecute and receive the fines for contraventions of the Ordinance, are overwhelming. The Syndic from the very first prosecuted this affair, as he is authorized to do by the Ordinance. It is in his name that, at all, the procedings have been taken; why should he now, be left out, as respondent under the appeal and the Crown be called upon to take his place. The words of the Ordinance as to the Syndic rights, powers and authority are very broad. The Syndic is entitled to act from beginning to end of the Complaint.

Art. 81 "Complaints for contraventions of "any provision in the first Chapter of this "Ordinance may be made by:"

"Any Inspector of Police, any Inspector of "the General Board of Health or the Local "Board of Health within whose jurisdiction "such contravention shall have taken place, "*or by the Syndic, or Joint Syndic*, or guar- "dian of any canal receiving water from the "River or stream in or on either bank of "which such contravention occured."

"Complaints for contravention of any pro- "vision in the second Chapter of this Ordi- "nance may be made and prosecuted by the "*Syndic or Joint Syndic* or Guardian (with "consent as aforesaid) of the canal to which "the contravention shall apply, or by any "'Riverain" whose interest shall be injured "by such contravention."

"The provisions in this article are without "prejudice to the power of the Procureur "General to institute any such complaint "aforesaid."

"Art: 82:—All fines which shall be "recovered in virtue of this Ordinance, shall "be disposed of as follows."

"1o. If recoverable on prosecution by the "Syndic, Joint Syndic or Guardian of a "Canal *they shall be payable to the Syndic* "*thereof for the maintenance of the Canal.*"

"2o. In case of prosecution by an Ins- "pector of the Local Board of Health, the "fines recovered shall be payable to the "Treasurer thereof as part of the funds of "the Board;"

"3o. *In all other cases,* the fines shall be "paid to the Treasury."

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master, | F. HERCHENRODER, Esq., Registrar
J. A. ROBERTSON, Esq., Substitute Master, | L. ISNARD, Assistant Registrar.

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
J. H. SLADE, Esq., Registrar.
J. BOUCHET, Queen's Proctor.
G. A. RITTER, Marshall.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E.	1828	Jenkins, T. L.	1865	Brown, R. M.	1870
Campbell, C. M.	1841	Florent, E	1865	Lionnet, F.	1870
Naz, Hon. V.	1857	Lionnet, H.	1866	Ollier, R.	1870
Bazire, E	1858	Lapeyre, A. E.	1866	Poulin, F.	1870
Leclézio, E J	1858	Desmarais, E.	1866	Forget, A.	1870
Pellereau, E.	1860	Bazire, E.	1867	Thibaud, L. A.	1871
Martin Moncamp, P. G	1861	Galéa, H.	1867	Pelte, E.	1871
Rouillard, L	1861	Lemière H	1868	Desenne, O	1871
Wilson, H.	1863	Avice, H	1868	Boucherat	1871
Chastellier, P. L	1864	Beaugeard, P.	1868	Galais, E.	1871
Delafaye, V.	1864	Pilot, G.	1868	Mathews, L. F.	1872
Guibert, G.	1864	Vaudague, E.	1868	André, A.	1872
Newton, W.	1864	Hamon, A.	1869		
Lepoigneur, I.	1864	Serret, E.	1869		

ATTORNIES (actually practising).

Pastor, E	1840	Piston, A.	1860	Rodesse, C.	1864
Mercier, J	1840	Laval, V.	1860	Gilot, F.	1865
Lalandelle, G.	1842	Chazal, P. E. de	1860	Halais, J.	1865
Hewetson, W.	1846	St-Perne, E. P	1860	Sauzier, M.	1866
Laurent, E.	1846	Tessier, G	1860	Sauzier, E.	1866
Ducray, E.	1848	Victor, F.	1860	Commarmond, A	1867
Hitié, U.	1850	Mallet, F.	1861	Robert, A	1868
Pignégay, J	1850	Ducray, V. G	1861	Desjardins, E	1870
Pastor, H.	1850	Gautray, C.	1861	Rousset, C.	1870
Colin, A J	1851	Sicard, N.	1862	Wohrnitz, L.	1870
Pragassa, V	1851	Simonet, F.	1863	Erny, P. J. A	1871
Guibert, J	1853	Pitot, A	1863	Rolando, A	1871
Finniss, W.	1853	Bétuel, A.	1863	St. Pern, L. de	1871
Slade, J	1853	Boullé, V.	1863	Ganachaud, E.	1871
Bouchet, J	1853	Rodesse, L. C.	1863	Ellie, J.	1871
Duvivier, Ed.	1853	Bertin, H	1864	Lastelle, F.	1872
Robert, F.	1857	Ritter, G A	1864	Edwards, E.	1872
Ackroyd, J	1859	Perrot, A	1864	Leblanc, W.	1872
Desperles, L	1859	Rohan, A	1864	Margeot, E.	1872
Herchenroder, T.	1860	Astruc, A	1864		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 3.

CONTENTS:

EDITED BY A. PISTON

ATTORNEY AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY AND P. DUBOIS,—9, BOURBON STREET.

1872.

What then is the position in which the case stands? We have the Syndic, the party who has been in the case, all along, left out of the appeal. We have the Crown, alone, called as Respondent in this Court.

The Procureur General attends, in obedience to the citation, but only for the purpose of stating that he can take no part in the discussion, as the crown has no interest in the proceedings which have been all along conducted at the instance of the Syndic under his statutory authority. We have the Syndic represented by Counsel who attends the Court and submits that as the appeal has not been well taken, it ought to be dismissed with costs. The appellant's Counsel, on the other hand, maintaining that as the Judgment of the Court, below, is not supported by the Crown, the whole proceedings should be quashed by this Court.

It appears to me that the pretensions on both sides are excessive and that it would not be just, in the circumstances, to allow either side to prevail at this stage of the case. I am of opinion that the Syndic of the Canal was the proper and only party requiring to be called as Respondent in a case of this description. But then the Ordinance is altogether silent as to appeals.

The only question is as to how and in what shape parties are to be heard in this Court and this is the first instance of an appeal in questions of this description. There is, I think, enough in the circumstances of the case generally, to shew that the appellant may have had fair doubts as to the form in which he was to introduce the proceedings into this Court. While, therefore, it will be understood for the future that the Syndic is the proper party to call in the appeal and not the Crown, I shall not dismiss this appeal, but shall order the Syndic to be made a party formally to it if he requires a formal citation, and the Court will then be ready to hear what the parties have to say farther on the first convenient day.

BAIL COURT.

—

CANAL OR RUN OF WATER,—APPOINTMENT BY THE FATHER OF A FAMILY,—("SERVITUDE PAR DESTINATION DU PÈRE DE FAMILLE,")—PIPES,—DRAWING WATER,—(DROIT DE PUISAGE,)—COSTS,—C.C. ARTS. 686, 692, 702.

—

Circumstances under which the Court decided that the Plaintiff was not entitled to a right of "puisage" (drawing water) from a canal crossing her land and conveying its water on the property of Defendants; the latter having proved their exclusive right of property upon such canal and water.

—

WIDOW HERMANS,—Plaintiff.

versus

WIDOW FLORIGNY & ors.
Defendants.
and *Contrà.*

—

Before

His Honor SIR C. FARQUHAR SHAND, KNT.,
Chief Judge.

—

L. ROUILLARD,—Of Counsel for Plaintiff.
J. PIGNÉGUY,—Attorney for same.

P. L. CHASTELLIER,—Of Counsel for Defendants.
F. VICTOR,—Attorney for same.

—

17*th April* 1872.

CHIEF JUSTICE.—The dispute between the parties in this case, has arisen in connection with a small canal or run of water commencing on the Estate called "The Mount" in the District of Pamplemousses, passing thro' the property of the Florignys and conveying water to the House of "Mon Repos," the residence of Mrs. Hermans. It appears from the evidence that the late Mr. Charles Féline, proprietor of "The Mount" Estate, purchased, some 20 years ago, two adjoining pieces of ground, the one of 6 ("Terrain Dinnematin") the other of 62 acres in extent. He united the two portions of land and built the House of "Mon Repos," as a residence for himself and his family. With the view of providing water for the use of his House, he asked and obtained the necessary authority to lead through the said ground and by canal or trench of about six inches in breadth and six inches in depth a small run of water 1½ or 2 inches in depth from the larger canal, upon "The Mount" Estate.

Mr. Féline died on 25th April 1855. He was survived by his widow; she died in 1862, leaving a Will dated 7th October 1858, by

which she bequeathed the said land to two persons : Mrs. Hermans and Mrs. Florigny ; the former getting the House and dependencies of " Mon Repos," with the larger portion of ground of sixty two acres ; the latter getting the smaller piece of ground of 6 acres formerly called, as we have seen, the "terrain, Dinnematin." In the time of Mr. Féline and of Mrs. Féline, this ground was planted in sugar canes and there were no houses upon it, excepting a shop situated on the high way crossing the land and well supplied with water, being within a few yards of the river of Pamplemousses between which and the said house there is only the breadth of the public highway. In 1863 the Florignys built a dwelling house and dependencies on their ground where they still reside. Mrs. Hermans resides at " Mon Repos."

The water in the Canal where it passed through " The Mount " Estate, was conveyed in an iron pipe; but within the terrain "Dinnematin," the canal or run of water was covered with flat stones not laid in lime or cement but with an inch or two of earth above them. It was shewn that from time to time the stones became loose and fell out of their places, and at the openings, persons were in use to take water by dipping in small basins or jugs (*moques*.) The size of the Canal did not admit of the use of ordinary watering pots. Some years ago, the Florignys let 2 or 3 acres of their land to Indian gardeners who were in the habit of taking water from the openings in the Canal to irrigate their plants.

In the month of October last, Mrs. Hermans, at a cost of about £60, caused iron pipes to be laid the whole distance in the bed of the Canal, effectually preventing any access to the water as it passed thro' the ground of the Florignys.

Some time afterwards a hole was made in the pipe, by order of the Florignys, sufficient to admit a man's little finger and the water flowing from this opening was caught in a basin or "*regard*" in the ground immediately below the hole in the pipe and the gardeners continued to take water for their vegetable ground :

The questions between the parties are brought before the Court under cross-Actions.

In the one, at the instance of Mrs. Hermans : she alleges that the Canal and the water in it are her exclusive property ; a servitude on the land of the Florignys in favor of the Estate " Mon Repos," having been constituted, as she contends, by the late owner of both properties, Mr. Charles Féline ; a servitude, viz. *par destination du père de famille.* She avers that the canal was covered with stones and no one could take water from it ; that she (Mrs. Hermans) always enjoyed the said water peacefully, as the owner thereof, without any interference on the part of the Defendants, till they caused the iron pipes which she had laid down for the conveyance of the water to be bored to her great prejudice ; that she had laid the pipes without protest or opposition on the Defendants' part, that by placing the said pipes the servitude existing over the Defendants' land was not aggravated, the pipes being covered up as the canal was ; that the pipes were laid with knowledge and without any opposition on the part of the Defendants and on the contrary, with their full knowledge and consent ; that the Defendants caused to be dug a basin or reservoir under the pipe on or about the 9th November last, close to the boundary of the two lands, and caused the pipes to be bored at that place and made the water to flow into the said reservoir or basin ; appropriating the water to their own use, tho' they had no right whatever to the said water ; that the Plaintiff is thus deprived of a large quantity of water to which she has a right.

The Plaint concludes with the demand that the Court should find that the Defendants have no right in and upon the pipes, canal and water and that the same are the sole and exclusive property of the Plaintiff ; and 2ndly. that the Defendants shall, within a delay of eight days from the date of Judgment, stop up all holes which they have made in the pipes conducting water to the Plaintiff's property and in default by them to comply with such Judgment, that the Plaintiff shall be authorized to stop up, at the expense of defendants, all such holes.

And further that the defendants be condemned to pay to the plaintiff the sum of sixty pounds sterling as damages, with costs of suit.

In the cross-Action by Mrs. Widow Florigny & ors. against Mrs. Hermans, the contention of the Plaintiffs is of this nature : they aver that Charles Félines, during his life time, had established an open canal in masonry upon the land now belonging to them with a small basin or reservoir, on the land, in connection with the canal and placed near the boundary separating their land from the "Mount" Estate, so that the owners and occupiers of the land might be able to take water from the open canal ; that a *droit de puisage* was thus established and enjoyed by all who occupied the land, until October last, when it was disturbed by the defendant, Mrs. Hermans, committing a trespass against the will of the

Plaintiffs (Florignys) placing iron pipes in the canal and completely stopping any water from flowing therein.

The Plaintiffs alleged that by being thus deprived of the water, they have suffered damage to the extent of $300, and Judgment was asked from the Court ordering the removal of the iron pipes, the restoration of the flow of water, and failing the defendants restoring things to their former state, that the Plaintiffs should be authorized to do so at the defendant's expense and that the defendant should be also ordered to pay the Plaintiff $300, with costs.

On a careful consideration of the evidence which has been adduced in the two cases, and which it has been agreed shall be held as common to both, I am satisfied: 1o. That there was no consent given by the Florighys to the laying of the pipes by Mrs. Hermans, sufficient to prevent them bringing the present suit for their removal and the restoration of things to the position in which they previously stood.

2o. I do not think that, *ex-rigore juris*, it was necessary that Mrs. Hermans should ask for and obtain judicial authority before proceeding to lay the iron pipes. No doubt it would have been better if she had done so. But I cannot see that there was any aggravation of the servitude caused by the simple laying of the pipes in the bed of the canal, by Mrs. Hermans; therefore under Art. 702 of the Civil Code it does not appear to me that on that change of the state of matters made by Mrs. Hermans, taken by itself alone, the Florigny's can insist upon the removal of the iron pipes.

The question of difficulty and on which the decision of these cases must chiefly turn is what was the exact position of matters established by the late Charles Féline the common author of all the parties to the suits and the proprietor of the whole of the immoveable subjects now divided into three and belonging to the different owners. When he made the canal about which the dispute has now arisen, did he intend *(destiner)* it as well for the service, to some extent at least, of the land now belonging to the Florigny's thro' which it flowed, as to that of the land and house of "Mon Repos" where he took up his own abode. Now that the property of the two portions of land formerly belonging to him has passed into the hands of the parties to the present suits respectively, what is the true nature of the servitude established by law, in virtue of the rules of the "Civil Code" *par destination du père de famille*? (*C.C.* 686, 692.) Was the canal to be an open one, at least to the extent of allowing water to be taken from it at one or more places in the course of its passage thro' the "terrain Dinnematin," or was it to be a close canal solely for the benefit of the Establishment of "Mon Repos?"

On the evidence, taken as as whole, I am satisfied that the canal was intended to be and all the witnesses say it was originally a covered one. It was shut in with flat stones and earth. That it often fell into disrepair is also shewn, and that openings more or less extensive then existed and that into these openings, within the land of the Florigny's, small jugs or pitchers, *moques*, were occasionally introduced by Indians and others and that water was so taken from the canal, is equally clear. But all this would not establish in law the right for which the Florigny's contended, vizt: a right of *puisage* or drawing water from the canal as it passes through their land; the amount of water to be so drawn, they admit might be fixed or regulated by the Court. So far as we have gone, as yet there is no evidence that Mr. Charles Féline intended to establish any such right. He caused a closed canal to be constructed; the openings were due to accident or natural decay, and were repaired as they arose from time to time. It would appear that some years ago Auguste Florigny had made a little basin or *regard* in the canal at the nearest point to his dwelling house and had led a small run of water by an iron pipe into his Court Yard. But this lasted only for a short time, Florigny having apparently on the interference of the Guardian of the District Canal from which the water was taken on the "Mount" Estate, filled up the basin and stopped up the pipe. It was the Guardian's duty at that time to see that the surplus of water should be made to return from "Mon Repos" into the River. The fact, therefore, that some water was, for a time thus taken from the Canal by the Florignys is not of importance. The thing was not persistently done and it was abandond on the first challenge.

In a question as to the legal rights of parties here, it is not to be overlooked that Mrs. Hermans pays and has, all along, paid her contribution to the general funds of the District Canal; in that respect she has always been acknowledged and dealt with as the sole owner of the branch-canal in question. The Florignys pay nothing.

There is one very material allegation made here by the Florignys, viz: their statement regarding the existence, all along, from the first construction of the canal of a small basin or reservoir (*regard*) at the boundary between the "Mount" Estate and the *terrain Dinnematin* now the property of the Florignys.

Let us see what the witnesses tell us about this basin or *reservoir*.

Some of them deny its existence, altogether. But the great weight of the evidence is in favor of there having been such a basin in the time of Mr. Féline. But this basin formed no part of the canal as originally made. The mason Victor who was employed to construct the Canal tells us that he made 3 basins *or regards* by order of Féline; 2 on the "Mount" Estate and one at Mrs. Hermans house. Nothing is said by him of the basin or *regard* in question. His evidence, therefore, negatives the allegation that it existed from the origin of the canal and was part of the canal as constructed by the orders of Féline.

From the evidence, it appears to have been dug or hollowed out subsequently. It is situated within about 12 feet of the Indian, laborers camp on the "Mount" Estate; it was probably made by them for their own convenience and water was certainly drawn from it by those Indians for their own use. In fact when the canal was made, and for a considerable period thereafter, there were no other persons on the spot to take the water or profit by the existence of such a *regard*. The *terrain Dinnematin* now the property of the Florignys was at that time planted in canes, no part of it was then, as it is now, let to gardeners who require to water their vegetables. The only house on the Florignys ground, at that period, was a shop tenanted by an Indian. The shop was quite close to the River and he had no occasion to resort to the canal in question to procure the supply of water he required for his family.

I think, therefore, that the evidence altegether fails to establish that Charles Féline's intention was to establish a right of "puisage" in favour of those who dwelt on the land now the property of the Florigny's. We have seen that from the almost total absence of inhabitants on that ground and the proximity of the River, such a right was not then required, and the fact that the later proprietors have chosen to build houses on the ground and let several acres of land to Indian gardeners, cannot change the rights of parties to the water. No doubt it would be somewhat more convenient for these gardeners to take water from the canal for the irrigation of their vegetables, but I cannot find any ground for holding that they have a legal right to do so or that their lessors, the Florignys, have any right of property in the canal or any right to interfere with the water. This is the only question really before me, and at the worst, the gardeners, with some extra labour, can draw water in abundance from the River which intersects the land. On the whole, therefore, and not going beyond the special facts of these cases with which I have alone to deal, I find and decide that in the action at the instance of Mrs. Hermans vs. Mrs. Widow Florigny & ors., Judgment must be entered for plaintiff in terms of her plaint, but without damages, and that the action at the instance of Mrs. Widow Florigny & ors, against Mrs. Hermans be dismissed. Looking at the whole circumstances of this dispute between the parties, the position in which they stand with reference to each other, and their conduct generally, I shall only allow the successful party one half of her taxed costs in each case.

BAIL COURT.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE, — ORAL EVIDENCE, — PLAINTIFF'S EVIDENCE IN HIS OWN CASE SUFFICIENT IF UNCONTRADICTED.

On an appeal from a Judgment of a District Magistrate, the Court will not review it merely because it rests on a commencement of written proof supported by the Plaintiff's evidence only, when that evidence was not shaken by cross-examination and no witnesses were called to contradict it.

MA VEERAPATEN,—Appellant.

versus.

PEEROOMALACHETTY,—Respondent.

Before

His Honor Mr. JUSTICE N. G. BESTEL.

T. L. JENKINS,—Of Counsel for Appellant
F. SIMONET,—Attorney for same.

L. COX,—Of Counsel for Respondent.
M. SAUZIER,—Attorney for same.

22nd April 1872.

This was an appeal from a Judgment of the District Court of Flacq, dated of the 17th January 1872, which condemns the now

Appellant to pay to the now Respondent, the sum of £ 40 for so much money lent, plus interest and costs.

Though several grounds of appeal were urged against the soundness of that Judgment, the main ground, however, was that that Judgment should not have been given in favor of the Plaintiff below, and now Respondent, for the following reason: The entry admitted in evidence is only a commencement of written proof which required being corroborated by parol evidence, not that of the Plaintiff below, as in this case, but of such other witnesses, who, for instance, might have been present at the transaction spoken to or might have a personal knowledge of the money having been paid by the plaintiff on account of a larger sum promised as a loan, or on account of a debt due by the Plaintiff to the Defendant, below.

That entry does not, certainly, lead to the necessary inference that the $200 had not been received by the Defendant, now Appellant, as a loan. It clearly implies that it was a payment on account, what account is not stated. Should not the Magistrate have called for evidence to explain the true import of that entry? He has not done so. He has contented himself with the evidence of the Plaintiff who, of course, had an interest in supporting his plaint.

The reply of L. Cox to L. JENKIN'S argument on this head, was as follows:

The law allows parol evidence in support of the demand, whenever there is a "commencement de preuve par écrit" rendering likely the fact alleged. That parol evidence has been adduced and the Magistrate who heard the plaintiff as a witness in his own cause, it is true, was satisfied of the Plaintiff having stated the truth in his deposition, made, as it had been, in presence of the then Defendant, who having an opportunity of cross-examining the Plaintiff durst not do so. If cross-examined, the Plaintiff would or might have satisfactorily explained the meaning of the words "on account" and thus cleared any ambiguity in that entry, or if not, he might have called, to prove the loan alleged by him, witnesses who might have been present when the money was counted over to him, and the cause of such payment. If he had not done so, the Magistrate might have ordered them to be called, and in default of such witnesses might have had recourse to other legal means to arrive at a sound conclusion such as the administration to Plaintiff or Defendent of the supplementary oath.

JUDGMENT.

Whether in cases similar to the one now under appeal, parol evidence is permissible in law, is, I find, a controverted point. On one side we have MARCADÉ (Art. 1329 and 1330 C. C V. 5, page 59) which denies the admissibity and legality of parol evidence, and maintains that the suppletory oath administered by the Court, whether to Plaintiff or Defendant, is the *only means* of proving the truthfulness of the entry made by a trader as against a non trader; on the other side we have TOULLIER who from the fact of the law having permitted the use of the supplementory oath infers the legality and admissibility of parol evidence (TOULLIER Vol 8, No. 368 and following page 546) in proof of the correctness or non-correctness of such entry.

Be this as it may, I should not be warranted in setting aside the Judgment appealed from on the sole ground of the Magistrate having allowed parol evidence, the legality and admissibility of which was never disputed in the Court below, and of which on appeal the appellant maintained that the Magistrate should have availed himself before coming to a conclusion on the merits of the case.

Has or has not the Magistrate availed himself of that parol evidence which he was bound to listen to before making up his mind as to the liability of the now Appellant to refund to the Respondent the amount claimed by the latter; whether as a loan or on any other ground? The Magistrate heard the Plaintiff below on his solemn affirmation in open Court; in presence of the Defendant now Appellant who heard the answers to the questions put to him, when he saw that the Plaintiff, on solemn affirmation, maintained his allegations that the Defendant had received the money as a loan, and not on account of their former transactions as partners or in payment on account of any debt due by him to the defendant; surely it is not expecting and requiring too much from the defendant, that he should have tried by cross-examination to shake the weight of the evidence of plaintiff by putting to the latter questions calculated by his answers to establish either the contrary of the plaintiff's assertions, or paving his way to adduce evidence to contradict plaintiff's deposition. Instead of doing this he contented himself with saying that he was not ready with his case, moved for an adjournment of a trial which having been hanging on for some time, the Magistrate very rightly refused to grant.

The Magistrate's decision rests not on the entry made by the Appellant, solely, but on

the strength of that entry, and of the evidence of the plaintiff below. Satisfied thereby that the sum claimed was due by the now Appellant to the now Respondent, as a loan, he was fully warranted in giving the Judgment now appealed from.

Had it been shewn that the Magistrate in his adjudication had abused the legal discretion rested in him, I would not have hesitated altering or even reversing his Judgment. But in the absence of any such proof, I must and do dismiss this appeal and accordingly affirm the Judgment, with costs against Appellant.

SUPREME COURT.

STIPENDIARY MAGISTRATE'S JUDGMENT,—"COLLICITANTS,"—THEIR PRIVILEGE,—APPEAL FROM JUDGMENT OF THE MASTER.

A Judgment of a Stipendiary Magistrate must be held as proving the facts it recites until regularly set aside by a distinct Action and cannot be attacked by way of exception.

The inscription taken "ex-officio" by the Conservator of Mortgages on transcribing a Judgment of adjudication on a licitation when the property is awarded to a colicitant, cannot replace the special inscription prescribed by Art. 2109 C. C., nor will it avail the colicitants as being the inscription of ordinary hypothec.

HEWETSON,—Appellant.

versus

BARRY & ORS,—Respondents.

Before the FULL COURT.

W. HEWETSON,—In person.

G. GUIBERT,—Of Counsel for Respondents.
V. G. DUCRAY,—Attorney for same.

26th April 1872.

Owing to the importance of some of the questions in this case, it was argued before the Full Court. The Judgment embodies the facts and arguments of parties.

CHIEF JUDGE.

The questions which we are called upon to decide in this case, have arisen in the course of establishing the "Ordre" of the sale price of the Sugar Estate "Riche Bois" in the District of Savanne."

The points to be determined for the present, are two in number. We find that all the parties interested joined in asking the Master to give his Judgment upon them, without entering upon other discussions which may probably arise before all the rights and pretensions of parties are determined in the "Ordre" for the distribution of the sale price. The Master has given his decision on the two points, and his Judgment has been brought under review by the appellant Hewetson. Altho', as a general rule, we cannot approve of a part of a case being brought up by appeal, leaving other questions for decision before the Master, which may afterwards come before us, in other words we cannot approve, in ordinary circumstances, of deciding cases by piecemeal; still, looking at the nature of the proceedings with which we are here dealing, viz: the fixing of the rights and interests of parties in the matter of an "Ordre" where questions concerning many different persons and relating to many distinct and different subjects usually arise, we think that it will be convenient and will probably tend to facilitate the progress of the "Ordre" if we at once dispose of the points on which the parties have obtained the Judgment of the Master, now brought under the review of this Court.

The general facts of the case are the following: The estate "Riche Bois" formerly belonged undividedly to Mr. Nicolas Courtaux & wife, married in community, for 3/8; Mr: Auguste Peyras & wife for 3/8, and Mr. Robert Brennan for 2/8. Mr. & Mrs. Peyras having died, the Estate was sold by Licitation to the said Courtaux & wife, on 3rd May 1859, for the sum of $ 230,000. As the purchasers were also part owners and sellers under the Licitation, it must be borne in mind that by Art. 883 of the Civil Code, they are held to have succeeded immediately to their share in the property and to have been proprietors of it all along. Courtaux and wife being unable to carry on the cultivation of the Estate, it was seized and sold under a forcible ejectment and awarded for the price of $ 250,000 to Mr. Wm. Hewetson in September 1866; the

said price to be paid to the creditors in the "Ordre" which was duly opened and provisionally closed on 23rd September 1870. The chief part of the sale price was collocated to certain privileged creditors to whose claims there was no objections. There remained a sum of about $ 40,000 to a portion of which the purchaser Hewetson claimed to be preferred having acquired rights from certain of the creditors of Courtaux and wife and he now stands in the shoes of these creditors.

The first question between the parties relates to an alleged claim of preference for arrears of salaries and wages put forward by certain of the *Employés* and laborers on the Estate. Those persons obtained judgment for their claim against Courtaux & Co., their *Employers*, on the 23rd October 1866, from the Stipendiary Magistrate of the District, and the Master while discriminating between the cases of Employés and *gens de service* as established by the Jurisprudence of this Court in the cases of *Montille & Geraudflé*, (PISTON'S *Report*, 1868 p. p. 20 & 42,) has given effect to this Judgment.

This finding of the Master forms the subject of the first question under the appeal.

Both before the Master and in the discussion under the appeal, the Judgment of the Stipendiary Magistrate, the basis of the claim of those parties and bearing the date, as we have seen, of 23rd October 1866, was attacked by Mr. Hewetson as being according to his contention, irregular, informal, and null, in respect, that not only, as he alleged, was there no appearance for the defendants Courtaux & Co. when the case came on before the Magistrate, but in fact they were not even summoned to appear and Courtaux had left the Colony without appointing any one to represent him in his absence and it is alleged that the Stipendiary Magistrate must have been aware of the fact, and also that the property had passed by sale to the appellant on the 28th September 1866.

On referring to the proceedings before the Stipendiary Magistrate, we find that the record bears that the demand was made against Messrs. Courteaux & Co. of "Richebois" Estate by the plaintiffs for their wages; that Mr. A. Régnard chief overseer of the Estate attends for defendants, admits complainants' claims and hands over to the Magistrate "a pay list" showing the amount due to each complainant, which was explained to them and accepted by them, and Judgment was given by the Magistrate for the total amount due to the claimants. Now this is a Judicial record the truth and honesty of which has never been impeached in any competent form *stat pro veritate* till so impeached. Every presumption of law is in favor of the truth of what the record bears; we must presume that *omnia rite and solenniter acta sunt* and that the Magistrate was duly satisfied with what went on in his presence, and had evidence before him to support the statements set down by him in the record: We do not know what means the Magistrate took or had on the spot and at the moment, to satisfy himself on the points mentioned in his Judgment and on the case generally. At this distance of time it might not be easy to satisfy such enquiries if they were made in the way pointed out by the law for upsetting judicial records. At the same time it must not be forgotten that the truth of such Records is only presumed; all that we say is that they cannot be set aside, as is here attempted, merely *ope exceptionis*; a separate and distinct formal suit for this purpose would be required. As matters, therefore, now actually stand, and as the case is presented to us, we must decide that, on this first point, the Judgment of the Master be affirmed with costs.

The second question for determination is one of great importance in our law of Hypothec or mortgage and we have had the benefit of a very full argument from both sides of the Bar.

It arises in this way: By Art. 2109 of the Civil Code, it is declared that a "co-héritier" or "co-partageant" in a sale of immoveable property shall preserve his preference or privilege, on the price, by an Inscription made "à sa diligence" within 60 days, to date from the act of "partage" or adjudication by Licitation. It is admitted by the claimants who are heirs, legatees or creditors of Auguste Peyras and Peyras and wife and who stand as Respondents here, that this Inscription was not taken by them; but they say that on 21st April 1860 *i.e.* nearly one year from the adjudication in the Licitation, the Judgment of adjudication was transcribed in the mortgage Office and of the same date an inscription was taken *ex-officio* by the Conservator of Mortgages, No. 363 of Vol: 108, stated by him to be at the instance of all the heirs Peyras, *nominatim*, Mr. and Mrs Courteaux and Mr. Brenan the sellers under the Licitation, against the purchasers Courtaux and wife, whereby the fullest publicity was given to all the world, of the claims, interests and rights of all parties in connection with the Estate in question.

It appears that in the provisional "Ordre" Elizabeth Régnard an alleged creditor of Courteaux and Peyras, was collocated for her claim of $ 435 and Edgar Courteaux, in minority, claimed for the sum of $1000 as alleged legatee of the late Auguste Peyras and was

also collocated in the "Ordre." The right of these parties to be ranked or collocated is disputed by the appellant Hewetson on the broad ground that the privilege of the Colicitants Peyras and wife, on the sale price, was not preserved when the sale was made to Courteaux and wife in the way prescribed by the above quoted Article of the Civil Code (2,109) and that the sale-price can therefore be distributed only among the creditors of Courteaux and wife the other co-licitants and who alone have Mortgages legally and effectually inscribed upon and covering the whole Estate. The same general objection has been urged by the appellant against various other claims and the decison which we are now about to give will apply to those claims, also.

The answer which those in right as creditors, heirs or legatees of the late Mr. and Mrs. Peyras, make, is the following: They admit, as we have seen, that no Inscription was taken under Art. 2.109 of the Civil Code, to preserve the rights of Mr. and Mrs. Peyras within the 60 days which followed the adjudication of the property under the sale by Licitation, but they contend that their rights are sufficiently protected by the Inscription taken *ex-officio* by the conservator of mortgages, on 21st April. They say that this inscription prior in date to the inscriptions of the creditors of Courtaux & wife now represented by Hewetson, ought to prevail over them, or prime them, according to the ordinary rules of priority and preference in inscribed rights upon immoveable property. In dealing with the question it is necessary in the outset, to attend particularly to the following articles of the Code which have been much dwelt upon in the discussion. "Art. 2106: Entre les créanciers les privilèges ne produisent d'effet à l'égard des immeubles, qu'autant qu'ils sont rendus publics, par inscription, sur les registres du Conservateur des hypothèques, de la manière déterminée par la loi et à compter de la date de cette Inscription, sous les seules exceptions qui suivent."

Art. 2108. "Le vendeur privilégié conserve son privilège, par la transcription du titre qui a transféré la propriété à l'acquéreur, et qui constate que la totalité ou partie du prix lui est due; à l'effet de quoi, la transcription du contrat faite par l'acquéreur, vaudra inscription pour le vendeur et pour le prêteur qui lui aura fourni les deniers payés, et qui sera subrogé aux droits du vendeur par le même contrat: sera, néanmoins, le Conservateur des hypothèques tenu, sous peine de tous dommages et intérêts, envers les tiers, de faire, d'office, l'inscription sur son registre, des créances résultant de l'acte translatif de propriété, tant en faveur du vendeur qu'en faveur des prêteurs, qui pourront aussi faire faire, si elle ne l'a été, la transcription du contrat de vente, à l'effet d'acquérir l'inscription de ce qui leur est dû sur le prix."

Art. 2109 "Le co-héritier ou co-partageant conserve son privilège sur les biens de chaque lot, ou sur le bien licité, pour les soulte et retour de lots, ou pour le prix de la licitation, par l'inscription faite à sa diligence, dans soixante jours à dater de l'acte de partage ou de l'adjudication par licitation; durant lequel temps aucune hypothèque ne peut avoir lieu sur le bien chargé de soulte ou adjugé par licitation, au préjudice du créancier de la soulte ou du prix."

Art. 2,113. "Toutes créances privilegiées soumises à la formalité de l'Inscription, à l'égard des quelles les conditions ci-dessus prescrites pour conserver le privilège n'ont pas été accomplies, ne cessent pas néanmoins d'être hypothécaires; mais l'hypothèque ne date à l'égard des tiers, que de l'époque des Inscriptions qui auront dû être faites, ainsi qu'il sera ci-après expliqué."

Art 883. "Chaque co-héritier est censé avoir succédé seul et immédiatement à tout les effets compris dans son lot, où a lui échus sur licitation, et n'avoir jamais eu la propriété des autres effets de la succession."

How it should have happened that the rule contained in Art. 2109 of the Code, for the protection of the rights of Co-licitants on a sale by licitation, was neglected in the present case, we have not been informed. At the first blush of the question it is somewhat startling to be told, that the rights of those coming in place of Peyras and wife as co-licitants, have been well preserved to them by the inscription taken *ex-officio* by the conservator of mortgages, after the transcription of the deed of sale. It is admitted on all hands, that the usual and appropriate mode of proceeding pointed out by Art. 2,109 of the Code, was neglected, but it is said that what was done will, in the actual position of matters here give, under Art. 2113 of the Code above quoted, the parties claiming through the heirs Peyras, the preference over parties whose rights were not inscribed till a later date.

It has been argued by the appellant, with considerable force, that in disposing of the present question, the distinction between an ordinary sale of an Immoveable subject to 3rd parties and a sale by licitation among the heirs, themselves, where one of them becomes the purchaser, must be kept in view and is of itself conclusive in his favor. He says

that in the first case, the sale is properly an act "translatif" of the property; in the second by the force of art : 883 of the Code already referred to, it is merely "déclaratif" of the property which is held to descend to the purchaser as sole heir and representative of the *common ancestor*.

In the eye of the law there is no change in the owners; the proprietors continue the same, the adjudicatee is considered always to have been owner.

The law, by Article 2,109, as it is said, chalked out an express rule for the preservation of the rights of the colicitants not purchasers, on the property sold, just as, by Art 2,108, it has fixed the course of precedent to be adopted by sellers, in ordinary circumstances, to preserve their privilege, i e by transcription of the title which has transferred ("transféré") the property to another, a third party introduced for the first time to the world, as the owner of the subject. By the same Art., the Conservator of Mortgages must inscribe, *ex officio*, for the preservation of the sellers' rights and those of persons who have advanced funds to assist the purchaser in paying his price. It is contended that the procedure under the *later* Article, taken of course not by the colicitants, the heirs of Peyras and wife, who did nothing to protect their rights upon the subject sold, but by the conservator of mortgages, *ex officio*, cannot have the effect of preserving the privileged rights of the heirs Peyras over the the land, and that, especially against 3rd parties the lawful creditors of Courtaux and wife with inscribed Mortgages on the whole property.

It is farther submitted by the Appellant that the Conservator of Mortgages had no competency or authority to take an Inscription to which such a legal effect can be attributed and that the heirs Peyras took no conventional mortgage for themselves and that there is no room for the admission of equitable considerations here when the law is clear, and that if the heirs Peyras neglected to do what the law required, they or those in their right, *sibi imputent*, take the consequences, *vigilantibus non dormientibus subvenient jura*.

The Respondents do not admit that there is any such essential distinction between licitations and ordinary sales of immoveable property, and they contest all the arguments of the Appellant. They have put their case very strongly on the ground that in all cases of privileges upon immoveable subjects even should the privilege be lost, there still remains a tacit legal mortgage, which in the present case has been kept alive by virtue of Art. 2113 of the Code, in favor of the heirs Peyras and wife, by the Inscription taken by the Conservator of Mortgages on 21st April 1860, which Inscription they maintain the conservator was quite competent to make. In proceeding to deal with the question now before us, it appears to us that there are two privileges which the law views with a special favor, for the due preservation of each of which it has traced out certain special rules.

One of these privileges is the vendor's privilege, for the preservation of which Art 2,108, wills that "le vendeur privilégié conserve son "privilège par la transcription du titre qui a "transféré la propriété à l'acquéreur et qui "constate que la totalité ou partie du prix "lui est due; à l'effet de quoi la transcription du contrat faite par l'acquéreur vaudra "inscription pour le vendeur. . . . . .

"Sera néanmoins le conservateur des hypothèques tenu, sous peine de tous dommages et intérêts envers les tiers, de faire d'office l'Inscription sur son registre, des créances résultant de l'acte translatif de propriété, tant en faveur du vendeur qu'en faveur des prêteurs, qui pourront aussi faire faire si elle ne l'a été, la transcription du contrat de vente, à l'effet d'acquérir l'Inscription de ce qui leur est dû sur le prix."

The obligation laid upon the conservator of Mortgages, by the above article, of taking an Inscription *ex-officio*, in favor of a vendor and of the "tiers intéressés" is an evident departure from the ordinary mode of rendering public privileges and hypothecs, Arts. 2134, 2148, 2194, 2199 C C. & 834 Code of Civil Procedure, and must, like all other exceptional enactments, be construed strictly and not be extended to privileges or mortgages other than the subject matter of that special and exceptional enactment.

The law, next, occupies itself with the requisites for securing the privilege of a "copartageant" or "co-héritier" and lays down the following rules:

"Le co-héritier ou co-partageant conserve "son privilège . . . . . par l'Inscription faite "à sa diligence dans 60 jours à dater de l'acte "de partage, ou de l'adjudication par licitation.

"Après avoir établi en faveur du vendeur," says TROPLONG, *Priv. et Hyp* Vol. 1 page 374 No. 290, "une exception au mode ordinaire de rendre public les privilèges ou "hypothèques, le code rentre dans le droit "commun, en soumettant le cohéritier ou "co-partageant à la formalité de l'Inscription "et en lui ordonnant de prendre, lui-même, "cette inscription. Ainsi la transcription que

" l'un des co-partageants ferait de l'acte de " partage avec stipulation de retour de lot, ne " conserverait pas le privilège de ceux à qui " il devrait payer le retour de lot. Il faudrait " que les créanciers eussent pris une inscrip- " tion à leur requête."

We have thus before us, two special rules applying to two different privileges.

For their sound application we are evidently compelled to enquire first into the cause giving rise to the privilege which is attempted to be enforced. Does the privilege arise from a sale, that is from an " acte translatif de propriété?" It then becomes our duty to apply the rule laid down in Art. 2108, C. C., to see that its requirements have been strictly attended to.

Now, a sale is an " acte translatif de propriété ". So is a sale by Licitation when a stranger becomes the purchaser on that licitation.

Not so, however, if one of the co-heirs or "co-partageants or co-licitants" becomes purchaser. The Judgment of adjudication was therefore, not an "acte translatif ", but merely " déclaratif de propriété ".

Such being the case, we are driven to the necessity of applying the rule laid down in Art. 2109, C. C., for the preservation of the privilege of a co-heir, "co-licitant or co-partageant." The enactment of that Article, (2109 C. C.) firstly, requires no transcription of the judgment of adjudication, but a mere inscription to be taken, not by the Conservator of Mortgages, *ex-officio*, and as such Conservator, but an Inscription "faite à sa diligence", that is of the " co-licitant, or co-partageant," whether in person, or through the medium of any agent he may appoint to that effect, or by any third party commissioned or not. Art. 2,148, C. C.

In the 2nd place, the article, further requires that the inscription to be taken " à la diligence " of the " co-licitant or co-partageant " as above, shall be so taken within (dans) 60 days (à dater de) from " l'acte de partage ".

None of the requisites for the preservation of the privilege claimed by the respondents as " co-licitants or co-partageants " have been attended to for its due preservation in the present case.

The Inscription was taken *ex-officio* by the Conservator of Mortgages as such, and not at the " diligence " of the " co-licitants or co-partageants ".

2o. The Inscription was taken by the latter long after the 60 days from the date of the Judgment of Adjudication. The necessary *sequitur*, therefore, is that the respondents have lost their privilege and that the finding of the Master on this head in favor of the Respondents must be set aside.

Assuming, for the sake of argument, only, that the conservator, like any third party, fully warranted by law to step in to the relief of a negligent "co-partageant or co-licitant", a point upon which we don't think it necessary at present to give any opinion, it is clear that that assistance should be afforded so as effectually to benefit the party whose interest he is anxious to serve; but instead of taking an Inscription as *negotiorum gestor*, upon the authority of Art. 2148 C. C., the conservator has taken an inscription *ex-officio* which, however beneficial for the protection of a vendor's privilege, can in no wise secure the privilege of a "co-licitant or co-partagent."

We have given full consideration to the argument of the Respondents that the theory of the law of inscription was simply publicity of the burdens affecting property, and that when this main object of the law has been attained, it mattered comparatively little how it had been obtained, whether by a mistaken transcription and consequent inscription of the conservator or by the unauthorized inscription of any individual, whatever. We have also kept in view their application of this argument to the case before us, and their contention that the appellant was warned by the inscription such as it was of the burdens affecting the property, and that no mere technicality of law ought to be permitted to weight against the undoubted right of the Respondents which was duly notified to the public on the books of the Registry.

The mortgage law cannot, however, be dealt with merely as a matter of general principle. It is not publicity in the abstract for which the law has provided, but the publication of rights, and these rights may be created, or modified, or lost, by those very requirements of the law which the Respondents would have us to regard as nothing but technical modes of getting access to the Register.

The privilege and the hypothec now under consideration, for example, are rights essentially distinct. Different modes are prescribed for their conservation, but where the proper conditions pointed out by the law, have not been adopted to preserve the privilege, it loses its preference, and may become a hypothéque subject to the ordinary rules of ranking applicable to hypothecs.

The Respondents do not pretend that they or any one on their behalf took the steps to preserve their privileges, which are set forth in Art. 2109. They do not pretend, even, that the inscription, such as it was taken by the conservator, was taken within the 60 days from the date of the adjudication. But the inscription so taken is that of a privilege, exactly as if all the formalities of Art 2109 had been complied with It is true the Respondents, from the impossibility of maintaining the inscription as a good inscription of a privilege in their favor, are quite willing to waive it as such, on condition of getting the advantage of it as a sufficient inscription of "hypothéque" so as to make them prime the other "hypothéques" of later date. But we consider that an entry in the Register of Inscription must be either valid for the purpose which its terms import, or invalid for all purposes. If an Inscription of a privilege has been wrongly taken so that it cannot be upheld as preserving the right of privilege set forth, the entry must be regarded as of no effect for the purpose of constituting or preserving another right not mentioned in the inscription. Upon no other principle could the value and efficiency of the Registers be maintained, nor upon any other principle could the requirements of Art. 2113 be practically worked out. That article after mentioning that privileged rights submitted to the formality of Inscription, in regard to which the condition of the law for preserving the privilege had not been observed, did not cease, nevertheless to be of a hypothecary nature, adds: "mais l'hypothèque ne date à l'égard des "tiers, que de l'époque des Inscriptions qui "auront dû être faites ainsi qu'il sera ci-après "expliqué." If we were to accept the agreement of the Respondents that the inscription which is not valid as that of a privilege, is at least good as that of a hypothèque, we would give them an undue preference over the hypothecary creditors, among whom they are to rank according to the date of the inscription of hypothéque taken by themselves, and not according to the date of invalid inscriptions of privilèges taken in any manner whatever.

We are not much moved by the difficulty of bringing this hypothec springing from a privilege which has lost its rank, into the category of hypothecs mentioned in Art 2116. It is sufficient for us that the law declares that a privilege in such a position shall take its place among the hypothecary rights, always, provided that the creditor shall take the proper means to have it inscribed as such, and that it shall rank according to the date of the inscription so taken.

To sum up, the Respondents are no vendors. They are not therefore entitled to claim any benefit under the *ex-officio* inscription of the Conservator of Mortgages.

As "co-licitants or co partageants" they are not entitled to derive any advantage from an inscription required by law for the protection of a vendor's privilege.

Could they avail themselves of an inscription taken upon the enactments of an Article providing for a different kind of privilege? If so what is to become of the provisions of Art. 2109 C C., when and in what cases are they to find their application?

Again, uncertainty and confusion must be the inevitable result of such an indiscriminate application of the rules above referred to.

Assuming the existence of an implied Mortgage, we find ourselves in presence of a vendors' mortgage, and not of a "co-licitant and co-partageant's mortgage. How could the Respondents set up an implied vendor's mortgage to defeat the Appellants application to be collocated by preference to themselves?

The Masters's Order on this head, as already observed, must be and is accordingly reversed, but must be, and is, accordingly, affirmed as already adjudged as to the other points argued below.

Each party to the second point to pay their own costs.

BAIL COURT.

WORK,—AGREEMENT,—DELIVERY,—EXCESS OF WORK,—APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE.

A party cannot complain of the quality of work done after he has taken delivery of it without protest.

If buildings erected by a contractor really measure much more than stated by error in the contract, the extra work must be paid.

CHAILLET,—Appellant.

versus

CÉCILE,—Respondent.

Before :

[illegible] Mr. Justice N. G. B[illegible]

[illegible handwriting]

F. [illegible],—Of Counsel for Appellant.
[illegible],—Attorney for same.

C. [illegible],—Of Counsel for Respondent.
A. [illegible],—Attorney for same.

—

22nd April 1872.

[illegible] Ceilie, the now Appellant, [illegible] now Respondent [illegible] of the District of M[illegible] [illegible] carpenter and [illegible] to the [illegible] Court [illegible] said District.

The [illegible] was [illegible], in the said agreement, to be 28 feet long by 16 feet wide, with two verandahs, the front one to be 16 feet long by 11 feet wide, and the 2nd. 16 feet long by 14 wide. The whole work was to be done within three months and 15 days and the price thereof was $ 400. In case of non delivery within the time above stated, the Respondent was to pay $ 5 per diem.

It is alleged and not denied by the now Appellant, that the measurements in the agreement stated, and upon which Ceilie had based his "Devis", or estimate of the amount for which he was to undertake the completion of the house, was erroneous. The house measured, in fact, 36 feet in length and 18 feet wide. The front verandah 36 feet long by 10 feet wide; the second verandah 36 feet long by 12 feet wide. Additional work had therefore to be performed, for which extra work the now Appellant claimed $ 125 over and above the $ 400 the original price agreed upon, minus the sum of $ 295 for which the now Respondent had given credit, in the summons, to the now Appellant, for the appraisement of an appraiser. The now Respondent claimed from the Appellant, in the Court below, the balance of $1.5 alleged to be remaining due to him for work done and performed by him plus, as stated above, $ 125 for extra work.

The Defendant below, now Appellant, pleaded not indebted, and several other pleas which were successively overruled by the Magistrate, who finally ordered Judgment to be signed for the now Respondent in the sum of $ 230 with costs.

The Judgment has been appealed from on [illegible] I have carefully considered [illegible] untenable: [illegible] existing between [illegible] in the agreement [illegible] disputed by the Appellant in the Court below. 2o. The Appellant [illegible] of the real measurement when he signed the agreement [illegible] measurement. 3o. He [illegible] of the premises [illegible] of the house which he had paid [illegible] ; and had the Appellant been dissatisfied with the work done, he should have called for a survey before taking delivery of the work. Had he had any doubt as to the extra work, he might then have had it ascertained by the survey called in to inspect the work done. He has done nothing of the kind and now refuses payment of the balance claimed against him, as well as payment of the extra work, without [illegible] to prove the [illegible] existence [illegible] material error existing between the real measurements and the measures stated in the [illegible]'s estimate.

The contract was for the completion of a house of a certain dimension, and the house is finally proved to be one of a larger dimension.

For these several reasons, and those set out in the Magistrate's Judgment, I shall and do affirm the Judgment of the Court below, and I accordingly dismiss this Appeal, with costs.

SUPREME COURT.

—

DISAVOWAL OF A CHILD BY A HUSBAND.

—

A husband may disavow a child of which his wife was delivered during the proceedings for a divorce, when it is proved that the birth was concealed from him and there is a strong presumptive evidence that there was no intercourse between the husband and wife from the three-hundredth to the hundred and eightieth day before the birth of the child.

—

HASTINGS,—Plaintiff.

versus

BENNETT & ors,—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, KNT.
CHIEF JUDGE and
His Honor MR. JUSTICE N. G. BESTEL.

E. GALLET,—Of Counsel for Plaintiff.
A. PERROT,—Attorney for same.

Defendants leaving default.

14th May 1872.

This was an Action by a husband, in disavowal of the paternity of a child born by his wife pending a suit of divorce against her at his instance, on the ground of adultery.

The parties had been married on the 26th April 1865.

On the 6th April 1870, the wife had obtained Judicial authority from the District Magistrate, on the ground of threatened personal violence by her husband, to quit the conjugal residence for a time and live separate from her husband. On the 20th of the same month she raised a suit of divorce *a vinculo* against him on the ground of "excès, sévices et injures graves." Several of the witnesses having spoken to acts of gross familiarity on her part with a man who boarded in the house occupied by the spouses, the Court, on the 3rd November 1870, ordered that the defendant do, within 14 days if so advised, enter a cross-action of divorce based upon the adultery of his wife and that all proceedings in the present case be stayed in the mean time. An action was accordingly instituted by the husband, in which, after the usual formal procedure and having heard a number of witnesses and consolidated the suits, the Court on 26th October 1871 decided "that the action for a "divorce entered by Robert Daniel Hastings "against Marie Angélina Bersing his wife, "be admitted and that the parties be autho-"rized to proceed before the officer of the "Civil Status of Port Louis in the delay of "the law to have the divorce, so admitted, "pronounced by that officer, and further that "under Article 298 of the Civil Code, the "said Hastings the wife be condemned to "four months reclusion in Her Majesty's "Gaol of Port Louis."

"It was further ordered by the said Judg-"ment that the action for divorce entered by "Hastings the wife against the husband "should be dismissed."

The child whose legitimacy was in question in this suit of disavowal (en désaveu) was born on 17th July 1871. Mrs. Hastings was then living separate from her husband who averred that up to the date of the action in disavowal the "birth of the child had been "concealed from him by his wife: that the "child is not his child and that during the "time which has elapsed from the three hun-"dredth to the one hundred and eightieth "day previous to the birth of the infant, he "the plaintiff constantly lived separate from "the defendant, and that he never cohabited "with her."

A guardian *ad-hoc* having been appointed by the Court to watch over the interests of the child, he the guardian was called as Defendant in this action.

Various witnesses were examined from whose depositions it appeared that the birth of the child was concealed from the husband, and although the spouses were both resident in the Town of Port Louis, all the evidence tended to shew that there was no intercourse between them and that they never met from the 6th April 1870 till the birth of the child.

JUDGMENT.

The law of the Code Civil applicable to cases of this nature is contained in Arts. 312 and 313: Art. 312: "L'enfant conçu pendant "le mariage a pour père le mari."

"Néanmoins celui-ci pourra désavouer "l'enfant, s'il prouve que pendant le temps "qui a couru depuis le trois centième jus-"qu'au cent quatre-vingtième jour avant la "naissance de cet enfant, il était, soit pour "cause d'éloignement, soit par l'effet de quel-"que accident, dans l'impossibilité physique "de cohabiter avec sa femme."

Art. 313 "Le mari ne pourra, en alléguant "son impuissance naturelle, désavouer l'en-"fant: il ne pourra le désavouer même pour "cause d'adultère, à moins que la naissance "ne lui ait été cachée, auquel cas il sera admis "à proposer tous les faits propres à justifier "qu'il n'en est pas le père."

The rule of law *Pater is est quem nuptiæ demonstrant*, is one necessarily supported by the highest sanctions in every civilized system of law.

The exceptions contained in the above Arts. of the Code, are of a strictly limited nature.

In the present case the evidence of the concealment of the Birth of the child is conclusive. We therefore, at once, find ourselves within the operation of Art. 313 of the Code and are bound to admit in evidence and give effect to all the facts tending to shew that the husband is not the father of the child. On a careful review of the evidence, we are satisfied that this has been fully established. The physical possibility of access may no doubt have existed, but the evidence is, we think, legally conclusive that the spouses never met since their separation in April 1870 and we have seen that the child was born in July 1871. Judgment will therefore be entered for the Plaintiff. No costs.

SUPREME COURT.

—

PRESCRIPTION OF TEN YEARS,—GOOD FAITH, ORAL EVIDENCE.

—

When a party relies on the possession of his predecessors to make up the ten years prescription, under a just title and with good faith, (Art. 2,235—2,265 C. C.) he will not be allowed to adduce oral evidence of this if his predecessors have, when examined as witnesses, declared that they did not consider themselves as the owners of the land in dispute.

—

MILLIEN & ors,—Plaintiffs.

versus

GALÉA,—Defendant.

—

Before

His Honor SIR C. FARQUHAR SHAND, KNT., Chief Judge, and
His Honor Mr. JUSTICE N. G. BESTEL.

—

P. L. CHASTELLIER,—Of Counsel for Plain-
E. SAUZIER,—Attorney for same. [tiff.

H. GALÉA,—Of Counsel for Defendant.
E. DUVIVIER,—Attorney for same.

—

14th May 1872.

In this case the Plaintiffs were the following parties : 1o. Charles Millien of the District of Flacq, proprietor, acting as dative guardian of Héloïse Eléonore Louise Riccaud, widow of Edouard Lecoq, interdicted by a Judgment of the late Court of first Instance, dated the 17th February 1834, the said Charles Millien duly authorized to enter the present action by a family Council held on the 18th April 1864.

2o. Emilie Eléonore Lecoq, the duly authorized wife of Charles Millien, and the latter for the authorization of his wife and the validity of the proceedings.

3o. Félicie Louise Lecoq, widow of Louis André Leclair, absent from this Colony and therein represented by Charles Millien the wife.

The defendant was Mr. Dominique Galéa, proprietor of the Estate " L'assurance " now " Valetta," in the District of Moka.

The Plaintiff alleged themselves to be the owners of a piece of land of about 56 acres in extent, situate at the place called " Macabé " (in the District formerly of Plaines Wilhems, now of Moka) and asked that the Defendant as an illegal possessor of the said ground should be ordered to quit the occupancy and pay the plaintiffs $ 5,000 of damages for his enjoyment of the ground, with Costs.

At the outset, the defendant contested the title and capacities of the plaintiffs, but without success. (see supra.)

On the merits, the Plaintiffs averred that the land in question belonged to them tho' actually in the possession of the Defendant; that it was bounded on one side by the property of Labauve D'Arifat or those holding his rights; on the other side by the road leading to the peak of the middle of the Island; and on the third and fourth sides by portions of land of which the owners are unknown. They alleged farther that they were representatives of the late Edouard Lecoq (this was not disputed) who, they stated, came to be owner of the land by having " purchased the same on the eight of November 1820, at the bar of the late Court of first instance, through the medium of Mr. Attorney-at-law Kœnig, as the same is evidenced by a " declaration de Command made by the said Kœnig on the following day, that is to say: on the ninth of November 1820.

The defendant denied the averments of the plaintiffs and farther pleaded specially that all the lands which are and have been for the last nine years in his possession are, and have been so possessed by him, in virtue of title deeds conferring upon him the ownership of the lands.

That the defendant is the owner of all the lands of which he is in possession, inasmuch as he, and the former owners of the lands under whom the defendant holds the same, have been for upwards of the last thirty years in peaceful, continuous, uninterrupted, public and unequivocal possession thereof " à titre de propriétaire."

That the defendant is the owner of the lands occupied by him inasmuch as, he and the former occupants of the lands purchased the same in good faith and with a " juste titre," more than ten years ago, and have always continued to have, up to this day, the peaceful, continuous, uninterrupted, public and unequivocal possession thereof " à titre de propriétaire."

That even supposing (which is most expressly denied) that the defendant has been, for the last eight years, in possession of lands belonging to the plaintiffs, such lands as well as all the other lands of which the defendant is in possession having been conveyed to him by title deeds, of the defects of which, if any there be (which is expressly denied) he, the defendant, is and has always been utterly ignorant, he the defendant is not liable to the plaintiffs in the sum claimed by them as damages, or in any part thereof, for the occupation of the said land, but on the contrary, he is entitled to keep all the profits which he may have derived from such occupation, without accounting to the Plaintiff, in the shape of damages or otherwise.

The Plaintiff adduced a considerable amount of oral evidence in support of their plans and put in various documents.

At this stage of the case, the defendant admitted that under articles 2252, 2262, and 2265 of the Civil Code, he could not plead either the prescription of 30 years or of 10 years against the plaintiff Mrs. Widow Lecoq, an interdicted person, but contended that so far as related to the remaining half of the land in dispute belonging to the Plaintiffs, the two daughters of the said Widow Lecoq who were no longer in minority, he could, in point of law, plead both the long and the shorter prescriptions; that in the circumstances here arising, he did not propose to maintain that the longer of the two prescriptions was applicable to the case, but would confine himself to shewing that his rights were protected by the latter or shorter prescription of 20 years.—He admitted that in his own person he had not enjoyed ten years occupation of the land, but contended that under Article 2235 of the Civil Code, joining on the possession of his predecessors and Authors in the Estate to his own, he had a legal title to exclude the demand of the Plaintiffs the two daughters of Mrs. Widow Lecoq, as he and his predecessors had a "juste titre" and *bonne foi* for more than 10 years; and he, therefore, moved the Court to be permitted to adduce evidence that both he and his predecessors had possessed and occupied the land in question under sufficient titles and in good faith for more than the prescriptive period of 10 years.

On the defendant moving to be allowed to lead parole proof in support of his plea of prescription of 10 years (he abandoned, as we have seen, his defence of 30 years prescription) P. L. CHASTELLIER objected to the admissibility of such evidence on the following grounds:

It is admitted that Mr. Galéa's own title and good faith are not sufficient to sustain the plea now set up by him. He must fall back upon other persons, viz: the preceding owners of this Estate; but they or at least some of them, viz: the immediately preceding proprietors have been examined on oath, and their evidence is conclusive against the defendant's present pretensions. No farther proof can be allowed by the Court.

THE COURT.

The motion for further evidence is resisted by the Plaintiffs who contend that without alleging anything like bad faith on the part of the defendant, tho' in point of fact he had had sufficient warning that the plot of ground in question did not belong to his vendor and therefore could not be sold to him, the motion of the defendant, could not be granted. The previous proprietor had been already heard as a witness in the cause and had deponed in express terms that he was aware that the plot of ground in question belonged to Millien and not to himself.

In support of this objection, Counsel referred to what Mr. de Roquefeuil Labistour, the immediately preceding proprietor of the Estate "l'Assurance" now Valetta, had stated upon oath. His deposition was as follows: I was formerly the owner of the Estate "l'Assurance" now "Valetta." I know Millien who is now dead. I know the plot of ground claimed by Millien; this plot of ground is on the "terrain Maccabée;" it is before coming to the "terrain Mathieu where there is a

" shooting box. In 1862 I received a Sum-
" mons to attend a survey which was about
" to be made; I did not go. I cannot say
" who surveyed; I suppose it was Frogerays.
" Sometime previous to the Survey, as far as
" my memory serves me, Mr. Millien came with
" several other gentlemen. I am certain that
" Lionnet, the barrister now dead, was one of
" them who told me that he had come on the
" part of Millien to discover a piece of ground
" belonging to the latter. When I became
" purchaser of " l'Assurance " it was rumou-
" red among the neighbours that Millien had
" a piece of land in that neighbourhood.
" This was subsequently confirmed by Lion-
" net my legal adviser, who told me that Mrs.
" Millien had titles and that that piece of
" land belonged to her."

" I was not present at the Survey, having
" pressing business to attend to in Town.
" The piece of land had some brushwood and
" grass on it, after the survey, and Millien
" had take possession of the land, he built a
" hut on it in which two guardians lived."
I saw the hut and the men, and spoke to the men. They said they were ordered by Millien to watch over that piece of ground; they were to prevent any one from going on the land and to prevent " animals from going
" there; by animals, I suppose they meant
" bullocks which generally grazed at Macca-
" bée. "

Keeping this deposition in mind; let us now enquire what is the nature of the good faith required in law to sustain a title of ownership said to be acquired by the decennal prescription of the Civil Code. It is, we think, well described by *Marcadé* in the following passage from his treatise on *prescription* (Tit. 20 on Art 2269 of the Code.)

" La seconde condition exigée pour pres-
" crire par dix et vingt ans, c'est la bonne foi:
" on a déjà vu que la première condition ren-
" tre dans celle-ci, et qu'il ne peut y avoir
" bonne foi sans qu'il y ait juste titre; mais
" il peut très bien y avoir juste titre sans qu'il
" y ait bonne foi. Or la loi exige ici rigou-
" reusement et plus rigoureusement qu'on ne
" le pense quelquefois, cette condition de la
" bonne foi. Cette bonne foi doit être entière
" et complète, elle doit reposer sur les bases
" les plus respectables; elle doit nous montrer
" l'acquéreur à l'abri de toute espèce de re-
" proche, autre que celui de n'avoir pas dé-
" couvert l'absence de droit chez son aliénateur.
" C'est à ce prix, seulement, que la loi donne
" au possesseur la faveur insigne dont il jouit
" ici; c'est à ce prix qu'elle le préfère, même
" avant l'obtention de la prescription ordi-
" naire de trente ans, à un véritable proprié-
" taire dont la négligence peut quelquefois
" être bien légère, comme on l'a vu sous l'Art.
" 2239. (No. 111 P. 110.)

" La bonne foi se constitue ici de trois
" éléments: Il faut, en effet: 1o. Que l'ac-
" quéreur ait crû l'aliénateur propriétaire de
" l'immeuble; 2o. Qu'il l'ait crû capable de
" l'aliéner; 3o. que le titre de transmission
" ait été a ses yeux pur de toute espèce de
" vice. Si l'une de ces trois circonstances
" manque, le possesseur n'a donc pas acquis
" avec une conscience tranquille et en pleine
" sécurité; il n'a pas pu avoir la parfaite con-
" viction de son bon droit, et il n'a pas des
" lors la complète bonne foi que la loi éxige. "

It is plain from the deposition of Mr. Labistour, himself, that he could not have set up the defence of possession of the land in question, in good faith, as proprietor of it. He candidly admits that he had not and could not have had the good faith or honest belief that the piece of land in question was the property of his vendor. In the same way he tells us that he knows that the land was sold to him as part of his purchase of "l'Assurance."

As to the matter of good or bad faith in an individual, a matter within the breast of the person, himself, it is obvious that no one can speak so directly, or conclusively or with such authority as the person, himself.

We look upon the evidence above quoted as conclusive on the only point with which we are dealing, viz: the existence of the *bona fides* during the required period of 10 years. Assuming that the Defendant had such good faith all the time of his occupancy since his purchase, that is not enough to fill up and complete the decennal period. We are obliged to ascertain what was the knowledge and belief of his predecessor Mr. Labistour. That party, himself, tells us on oath, that he did not believe that the piece of ground was sold to him or that it was part and portion of his property of " L'Assurance." We see no room for further enquiry here. We cannot sustain the plea of prescription put forward by the defendant. We think the Plaintiffs, so far, as concerns the land, are entitled to Judgment. As to damages for any profit that the defendant may have derived from the use of the ground, looking at the delay in raising the suit and the circumstances of the case generally, we do not think that any such claim has been established in law by the Plaintiffs.

Judgment will, therefore, be entered for the Plaintiffs so far as relates to the land, but without damages. Costs to the Plaintiffs.

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master, | F. HERCHENRODER, Esq., Registrar
J. A. ROBERTSON, Esq., Substitute Master, | L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
J. H. SLADE, Esq., Registrar.
J. BOUCHET, Queen's Proctor.
G. A. RITTER, Marshall.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E, ... 1828
Campbell, C. M. 1841
Naz, Hon. V. 1857
Bazire, E 1858
Leclézio, E J 1858
Pellereau, E. 1860
Martin Moncamp, P. G 1861
Rouillard, L 1861
Wilson, H. 1863
Chastellier, P. L 1864
Delafaye, V. 1864
Guibert, G. 1864
Newton, W. 1864
Lepoigneur, I. 1864
Jenkins, T. L. 1865
Florent, E 1865
Lionnet, H. 1866
Lapeyre, A. E. 1866
Desmarais, E. 1866
Bazire, E. 1867
Galéa, H. 1867
Lemière H 1868
Avice, H 1868
Beaugeard, P. 1868
Pilot, G. 1868
Vaudagne, E. 1868
Hamon, A. 1869
Serret, E. 1869
Brown, R. M. 1870
Lionnet, F. 1870
Ollier, R. 1870
Poulin, F. 1870
Forget, A. 1870
Thibaud, L. A. 1871
Pelte, E. 1871
Desenne, O 1871
Boucherat 1871
Galais, E. 1871
Mathews, L. F. 1872
André, A. 1872

ATTORNIES (actually practising).

Pastor, E 1840
Mercier, J 1840
Lalandelle, G. 1842
Hewetson, W. 1846
Laurent, E. 1846
Ducray, E. 1848
Hitié, U. 1850
Pignéguy, J 1850
Pastor, H. 1850
Colin, A J 1851
Pragassa, V 1851
Guibert, J 1853
Finniss, W. 1853
Slade, J 1853
Bouchet, J 1853
Duvivier, Ed. 1853
Robert, F. 1857
Ackroyd, J 1859
Desperles, L 1859
Herchenreder, T. 1860
Piston, A. 1860
Laval, V. 1860
Chazal, P. E. de 1860
St-Perne, E. P 1860
Tessier, G 1860
Victor, F. 1860
Mallet, F. 1861
Ducray, V. G. 1861
Gautray, C. 1861
Sicard, N. 1862
Simonet, F. 1863
Pitot, A 1863
Bétuel, A. 1863
Boullé, V. 1863
Rodesse, L. C. 1863
Bertin, H 1864
Ritter, G A 1864
Perrot, A 1864
Rohan, A 1864
Astruc, A 1864
Rodesse, C. 1864
Gilot, F. 1865
Halais, J. 1865
Sauzier, M. 1866
Sauzier, E. 1866
Commarmond, A 1867
Robert, A 1868
Desjardins, E. 1870
Rousset, C. 1870
Wohrnitz, L. 1870
Erny, P. J. A 1871
Rolando, A 1871
St. Pern, L. de 1871
Ganachaud, E. 1871
Ellie, J. 1871
Lastelle, F. 1872
Edwards, E. 1872
Leblanc, W. 1872
Margeot, E. 1872

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 4.

CONTENTS:

EDITED BY E. DE LAPEYRE

BARRISTER AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY AND P. DUBOIS,—9, BOURBON STREET.

1873.

BAIL COURT.

—

RIVERS, STREAMS AND CANALS ORDINANCE No. 35 OF 1863,—RIGHT OF APPEAL IN CASE OF A CONVICTION UNDER THE SAID ORDINANCE,—APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE.

—

Although Ordinanee No. 35 of 1863, on Rivers and Canals, does not expressly grant an Appeal from conviction under it, yet as the terms of the Ordinances establishing the District Courts, give the right of Appeal in all cases in which a certain specified penalty is exceeded.—An Appeal will lie when a sentence is inflicted under Ordinance No. 35 of 1863 which would under the District Magistrate's Ordinances of 1852, admit of an Appeal.

—

ROUILLARD,—Appellant.

versus

THE QUEEN,—Respondant.

—

Before

His Honor SIR C .F. SHAND KNIGH,
Chief Judge.

—

L. ROUILLARD,—Of Counsel for Appellant.
M. SAUZIER,—Appellant's Attorney.

P. L. CHASTELLIER,—Of Counsel for Pitot.
G. A. Ritter,—Attorney for the same.

14*th May* 1872.

The Court having decided on the 19th March last, that parties might be farther heard under the proceedings by way of appeal as presented to this Court, it was now insisted on the part of the Respondent Pitot, the Syndic of the canal, that under the ordinance No. 35 of 1863, no appeal could competently lie to the Supreme Court.

It was maintained that in the Ordinance nothing was said of the right of a losing party, to appeal and without express authority allowing an appeal, it was contended that no appeal would lie, a case might no doubt be brought up by *certiorari*. Tho' a power to do so were not given in so many words, but to support the right of review by appeal, that form of procedure required to be positively and expressly conceded, *Chitty's practice page* 213. *Dickenson's Quarter sessions p.* 164. It was to be observed also that £ 50 was the heaviest fine for breach of the regulations in the Ordinance and there was no direct power to imprison, altho' if the fine were not paid, a certain period of imprisonment might have to be undergone. This showed that the proceedings were rather of a civil than a criminal nature.

ROUILLARD.—Contra.

The usual procedure in the Court of the District Magistrate must be implied when the water Ordinance, sends all cases, like the present arising under it to the District Court. The Ordinance itself says nothing at all about procedure. The ordinary forms, and remedies are therefore open to parties who go before the district Courts, in cases under that special law.

THE COURT.

There is no doubt, that the general doctrine contended for by the Respondent's counsel, is supported by the English authorities on which he relies *Dickenson & Chitty*. The former writer thus expresses himself, " the right of appeal is a qualified right, which cannot arise by implication, or exist without express enactment, whereas the common law remedy of *certiorari*, always lies unless expressly taken away by statute, nor can this right be extended by equitable construction to cases not distinctly enumerated."

Chitty's words are these, " but unless an appeal be expressly, or by the terms of the particular act clearly, impliedly given, none is sustainable," but he adds " as there is no gegeneral act giving or prohibiting an appeal, it is always necessary in each particular case to examine all the statutes relating to the subject, so as to ascertain whether an appeal is or not allowed.

Applying this last and very reasonable rule to the present case we know that the leading Ordinances establishing District Courts in this Colony are the two Ordinances of 1852, in the later of these, the forms of procedure to be followed in the conduct of the case through the Court below, are laid down, nothing is said in the water Ordinance of 1863 as to how the cases are to be conducted, they are ordered to be sent to the Court of

Minis-
favor

and after
weighing the
Plaintiff's demand
conclusions of

the Ministère Public and now decrees that judgment be signed for the Plaintiff, and that the said Mil the wife be divorced à *vinculo matrimonii* from her said husband Mil the Defendant with costs against the Defendant her husband.

BAIL COURT.

—

APPEAL FROM A CONVICTION OF DISTRICT MAGISTRATE—RIVERS, STREAMS & CANAL, ORDINANCE No. 35 OF 1863. NEW TRIAL.

—

Date of contravention not established by evidence, as laid in the information. Time is not of the essence of the charge in such a case.

—

ROUILLARD,--Appellant.

versus

THE QUEEN,—Respondent.

—

Before

His Honor THE CHIEF JUDGE.

—

L. ROUILLARD,—Of Counsel for Appellant.
M. SAUZIER,—Appellant's Attorney.

P. L. CHASTELLIER,—Of Counsel for E. Pitot.
G. A. RITTER,—Attorney for E. Pitot.

4th June 1872.

This case having come before the Court to be finally disposed of it was contended by Mr. Rouillard for the Appellant, that the conviction ought to be quashed in as much as the contravention of which the Appellant was found guilty was alleged to have taken place on the 12th September or thereabouts in the year 1871, while in point of fact, the dike complained of had been erected some 18 months previously. That the discrepancy was fatal; that if his client had been aware of what he was really charged with, he would have met his opponent with other evidence: that at all events he had not gone beyond what Mr. Connal the Surveyor of the Land Court would have allowed him to do and he proposed that a letter from that gentleman who was out of the Colony at the date of the alleged offence and who had since returned, should be read and should be held sufficient to entitle him to at least a new trial.

CHASTELLIER Contra:

THE COURT.

The second charge in the information, with which charge alone we are now dealing, runs as follows: That on the twelfth day of September or thereabouts, in the year of our Lord one thousand eight hundred and seventy one, at "Australia" Estate in the said District, one Gustave Rouillard proprietor of the said Estate, did by himself or by the manager of his said Estate, or by the employés or laborers thereof, illegally and unlawfully and without lawful authority, place or cause to be placed, in the bed of the same river at the head of a Canal dug by his orders or those of his manager, by his employés or laborers, and leading water to the spot where he placed the pipe, a dike or construction contrary to the provisions of the said Ordinance.

The Judge below found that this charge was established by the evidence. The only objection now urged against the conviction is that the date of placing the dike in the river was not established as laid in the information. But it must be observed that in such a case as this, the time at which the contravention began is not of the essence of the charge.—The offence is of the nature of a *crimen continuum*.—This established beyond all doubt that at the time stated, the obstruction was existing.—This is positively sworn to by the witnesses.—The Syndix had no means by which he could establish the first moment when the obstruction was placed in the river. The objection that in truth the obstruction had existed for some months before, would not in any view be a favorable one, and besides there is no evidence in the case establishing that this was true in point of fact; Farther no objection was stated in the Court below as to the non applicability of the evidence adduced to the charge as laid.—These considerations would be sufficient to meet the Appellants' argument in the appeal now before me—But under Art 133 of the Ord. 35 of 1852, the powers of this Court to sustain a conviction like the present would be sufficient to cover any such objection as is here urged on behalf of the applicant.—This ground of appeal cannot be sustained.

2o. By the general Rule of all jurisprudence a case must be decided *secundum allegata and probata.*—Even had there been some arrangement between the Appellant and the officer who is usually employed to see to the execution on the spot of the orders of the Land Court, the Magistrate in the District Court must alone in the first instance determine the rights of parties under the Laws of the Colony.—But no evidence has been adduced in the case to shew that the acts of the Appellant complained of, had received the sanction of the Land Court or of its officer. I see no ground for granting a new trial.

The appeal is dismissed with costs.

BANKRUPTCY COURT.

BANKRUPTCY,—BOOKS,—EVIDENCE,—SALES AT REDUCED PRICE,—YEARLY INVENTORY —CERTIFICATE REFUSED.

There must be a cash book, which is an essential book, by which the transactions of the Bankrupts could be ascertained.

The sales at reduced prices were not the result of a momentary pressure but had begun under the old and continued by the new firm, and that without any probable expectation or hope, on part of Bankrupt of ever retrieving their position.

Yearly inventory is necessary in Commercial matters

IN RE :

BANKRUPTCY PITCHEN & COLLARD

Before

His Honor N. G. BESTEL, First Puisne Judge.

P. L. CHASTELLIER,—Of Counsel for Assignees
G. RITTER,—Attorney for same.

E. BAZIRE,—Of Counsel for Bankrupt.
G. TESSIER,—Attorney for same.

10th June 1872.

CHASTELLIER on behalf of the Bankrupt's Assignees opposed the motion by Bazire for a certificate on behalf of the Bankrupts.

Pitchen had a grain warehouse the management of which was instrusted to an uncle, and he occupied himself as a clerk to Mr. R. Harvey a wharfinger.

Little attention did he pay to the management of his warehouse. The management was so bad that he found himself in difficulties. In order to extricate himself from those difficulties he took in as a partner E. Collard with the very insufficient capital of $ 300 for mastering the pecuniary difficulties of the old and new firm, not only did Collard enter the partnership with a very small capital, but he was imprudent enough to do so without making even a summary inventory of the stock in trade, were it only with the view of ascertaining the true state of the Firm he was about to join. He entered Pitchen's firm on the 24th December 1871 from which day he had the sole management of the firm. All debts from that date were contracted by him, he made the purchases, and sold the goods. Purchases made for cash, were not paid cash, and yet the goods so purchased and unpaid were immediately sold at reduced rates by the new as well as by the old firm. Though selling at a loss their stock in trade they continued making purchases to keep up their stock. The consequence was first a refusal by one of the vendors Ireland Fraser & Co. to complete delivery of 300 bags of rice bought from them on the 21st February 1871 until payment of 140 bags of rice previously delivered. This refusal of the delivery by Ireland Fraser & Co. says Collard was the cause of Pitchen and Collard's insolvency and application on the 10th March to the Court for leave to make with their Creditors an arrangement under its control. This proposed arrangement failing they were adjucated Bankrupts on 3rd April 1871. They were therefore insolvent when purchasing the rice from Ireland Fraser & Co. The reduced price realized for the rice delivered went not to pay Ireland Fraser & Co., but to pay other creditors of the Bankrupts. The sales at reduced prices were not the result of a momentary pressure, but had begun under the old, and continued by the new firm, without the probable expectation or hope on part of Bankrupts of ever retrieving their position.

On reference to G. Brouard's evidence a merchant and creditor of Bankrupts I find that after examination of Bankrupt's books he has been unable to come to any conclusion

as to the cause of their Bankruptcy. Pitchen was in a state of Bankruptcy when Collard joined him. There were only three books. One of sales, one of purchases, one day book from which however no correct information could be obtained.

There was no cash book an essential book says witness Brouard from which the transactions of the Bankrupts could be ascertained, by which we might have seen whether the monies received by the new firm went to pay off the old or the new debts. I cannot understand the deficit of $6,000 said Brouard.

The partnership lasted two months during which time they sold for $ 8,707. I cannot understand how the creditors could have sustained a loss of $ 7,000 odd dollars, all the materials required for making the cash book are not to be found in the day book.—I tried (in vain) to ascertain Bankrupt's position by their books.

In presence of such evidence bearing in mind the Statement of Pitchen of his insolvent circumstances which led him to undersell the goods purchased from others for the purpose of extricating himself from his then difficulties, and the continuation of the same evil practice by Collard on joining Pitchen; the absence of the yearly inventory prescribed by our Commercial Code, the imperfect state of the day book, the absence of a cash book, the impossibility of making up a cash book, both from the day book, and bank book, to ascertain the true cause of the Bankruptcy; Further if the amount of the Assets be borne in mind $ 2,375 and the liabilities $ 9,257, the deficit would amount as observed by Brouard to $ 6,882; the inability or unwillingness of either of the Bankrupts to explain the existence of such deficit, is it not astounding in presence of such inability or unwillingness and the other facts above referred to that the Bankrupts should have had the boldness to ask the Court for a Certificate.

The refusal of a Certificate is the least evil that can happen to the Bankrupts. For it I had had evidence that the Bankruptcy had been brought about from a wilful intention of defrauding their creditors, I would not have hesitated to refer the record to the Ministère Public for prosecution before the Criminal Court. In the absence however of such evidence I shall content myself with refusing the Certificate prayed for.

Certificate accordingly refused.

BANKRUPTCY COURT.

BANKRUPTCY,—BOOKS CARLESSLY KEPT,—REFUSAL OF A CERTIFICATE.

It is not sufficient that there should be books, they must be properly kept, and balanced from time to time.

IN RE:

BANKRUPTCY, EMILIEN YARDIN.

Before

His Honor G. N BESTEL, The First Puisne Judge.

M. CAMPBELL,—Of Counsel for Bankrupt.
F. SIMONET,—Bankrupt's Attorney.

L. ROUILLARD,—Of Counsel for Assignees.
V. BOULLÉ,—Attorney for same.

10*th June* 1872.

The motion of Campbell on behalf of Bankrupt Yardin for a certificate was opposed by Rouillard on behalf of the assignees.

The evidence of the Bankrupt himself shews the careless manner in which he kept the few books he thought fit to keep.

Hence his unability satisfactorily to account for his insolvency. "It is not sufficient that "there should be books, they must be properly kept, and balanced from time to time so "that at any time, the real state of the trader's "affairs may at once appear" (shelf. Bank. Law p. 399.)

Certificate refused.

SUPREME COURT.

TITLE,—PRESCRIPTION,—SURVEY.

Before hearing parties upon the plea of Prescription, it is right that the boundary lines, should be completed, Survey ordered. A complete plan of the locality must be made in order to enable the Court to follow with great distinctness evidence of Possession.

THE COLONIAL SECRETARY,
—Plaintiff.

versus

BUTTIÉ & ors,—Defendants.

—

Before

His Honor N. G. Bestel, The Fist Puisne Judge.
His Honor J. Gorrie, The Second Puisne Judge.

—

Lionel Cox, Act. Sub. Proc. Gen. — Of Counsel for Plaintiff.
J. Bouchet,—Plaintiff's Attorney.

P. L. Chastellier,—Of Counsel for R. C. Buttié, Bergicourt & wife.
A. Colin,—Attorney for R. C. Buttié Bergicourt and wife.

E. Pellereau,—Of Counsel for J. Buttié widow Buttié & M. E. Buttié.
Mercier,—Attorney for J. Buttié, widow Buttié and M. E. Buttié.

19*th June* 1872.

The importance of the issue in this case led us to take time to consider of the judgment to be given on that part of the case which had been argued before us, having reference to the question of title.

We had made up our mind as to the conclusion to be arrived at, when on further reflection it appeared to us inadvisable to deliver our judgment upon a part of the case, and we further deem it advisable that before hearing parties farther, a survey of the disputed landmarks should be made by other surveyors than those already employed by parties, whether by the Crown, or by the Defendants.

And therefore, before proceeding to hear parties further upon the plea of prescription, we think it right that the boundary lines, of the concession Roger should be completed.—We accordingly direct Mr. Joseph Pastourel and Mr. Charles Stapleton de Joux sworn land surveyors to proceed to the ground (concession Roger,) and after verifying and if necessary opening up, of new, the lines mentioned in the Procès Verbal of Merle to measure off trigonometrically a superficies of 156¼ acres thereabouts, and to open up the remaining line or lines necessary to complete the boundaries of that superficies in addition to those laid down by Merle. In short to complete the boundaries of the concession Roger, proceeding on the data provided by Merle, as if the concession were being opened up and completely defined for the first time.

And with a view to the further evidence which may be produced on the question of prescription, and whilst the said land surveyors are on the spot they shall also make a complete plan of the locality shewing the natural features especially between the Rivière des Créoles and the top of the mountain "la Table à Perot," which may enable the Court to follow with greater distinctness evidence of possession, and shewing also any huts or patches of cultivation existent or abandoned which may serve to distinguish particular spots. The fees of the said survey to be paid in the first instance by the Plaintiff.

Rights of all Parties in the meanwhile duly and fully reserved.

SUPREME COURT.

—

Divorce,—Evidence.

—

MICHEL the WIFE,—Plaintiff.

versus

MICHEL the HUSBAND,—Defendant.

—

Before

His Honor N. G. Bestel, The First Puisne Judge.
His Honor J. Gorrie, The Second Puisne Judge.

—

W. Newton,—Of Counsel for Plaintiff.
Ackroyd,—Plaintiff's Attorney.

Defendant appear in Person.

19*th June* 1872.

In this case the Court finds sufficient proof in the evidence of Widow Knight, Widow Thompson and subsequent witnesses to support her demand for divorce, we hereby accordingly grant the plaintiff divorce a vinculo matrimonii prayed for.

Costs against Defendant.

SUPREME COURT.

—

CONSEIL PRIVÉ,—APPEL--VALEUR EN LITIGE,—CIRCONSTANCES DANS LESQUELLES LA COUR A ACCORDÉ L'APPEL DEVANT SA MAJESTÉ EN CONSEIL, MAIS A REFUSÉ PENDANT CE TEMPS L'EXÉCUTION DE SON JUGEMENT EXCEPTÉ QUANT AUX FRAIS.

—

Il ne faut pas oublier que le Jugement de la Cour, qui a admis le titre des plaignants a été donné sur la déclaration telle qu'elle avait été faite, on avait admis que la demande était audessus de la somme exigée par la loi pour pouvoir faire appel.

Prenant en considération les circonstances toutes particulières de cette affaire la motion pour obtenir l'exécution du Jugement pendant l'appel, doit être accordée quant aux frais seulement.

—

PRIVY COUNCIL,—LEAVE TO APPEAL,--VALUE IN DISPUTE,—CIRCUMSTANCES IN WHICH THE COURT GRANTED LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL, BUT REFUSED INTERIM EXECUTION EXCEPT AS TO THE COSTS OF SUIT IN THIS COURT.

—

It must not be forgotten that the Judgment of this Court sustaining the title of the plaintiffs was given on the whole declaration as it stood. That demand as a whole was admittedly above the statutory value.

Looking at the circumstances of the case, which are somewhat peculiar, the motion for execution pending the appeal, ought to be granted so far as relates to the costs.

—

GALÉA,—Appellant.

versus

MILIEN & OTHERS,—Respondents.

—

Before

His Honor SIR C. FARQUHAR SHAND KNIGHT
Chief Justice, and
His Honor N. G. BESTEL, First Puisne Judge.

—

P.L. CHASTELLIER,—Of Counsel for Plaintiffs.
E. SAUZIER,—Plaintiff's Attorney.

GALÉA,—Of Counsel for Defendant.
ED. DUVIVIER, —Defendant's Attorney.

19*th June* 1872.

This was an application for leave to carry this case to appeal to Her Majesty in Council. *See the report, supra Volume* 12 *Part,* 3 *page* 38.

The motion was resisted by the Respondents on the ground that the case was below the value with reference to which, by the Order in Council of 13th April 1831 appeals are permitted to the Privy Council,—should the appeal be admitted by this Court, then the Respondents asked for interim execution; viz: that they should be put in possession of the land in dispute and receive payment of the costs disbursed by them, they furnishing sufficient security, in the usual way, for repetition in case of the reversal of the judgment of this Court by the Privy Council.

THE COURT.

It does not appear to us that the motion for leave to appeal here can be resisted, we think that the amount "at issue" between the parties to the case, in the meaning of the Order in Council, was above £1,000 in value, and it must not be forgotten that the Judgment of this Court sustaining the title of the Plaintiffs and which will be reviewed by the Superior Court, was given on the whole Declaration as it stood, and necessarily before the Court had rejected any part of the demand. That demand as a whole was admittedly above the statutory value.

As to the motion for execution pending the appeal, we think, looking at the circumstances which are somewhat peculiar, that it ought to be granted, so far as relates to the costs which have been incurred by the gaining party, on the usual terms but not to the effect of putting the plaintiffs at present in possession of the land in dispute.

The defendant has a portion of land in cultivation, the crop will have to be reaped very soon. We think in the words of the Order in Council that it will be most consistent with real and substantial "justice," not to interfere with his possession and industrial operation in the meantime, but he is hereby ordered to keep an account of the produce of the land since the date of the final judgment in this Court in favor, of the Plaintiffs, and of the Costs and charges he may have dis-

bursed in connection with the land in dispute during the same period.

Costs of this motion for leave to appeal are awarded to Millieu & ors. to the extent of one half of the taxed amount.

SUPREME COURT.

—

HYPOTHÈQUES,—RADIATION D'INSCRIPTIONS,—ACQUIESCEMENT DE BOLGERD A LA COLLOCATION DE WILSON,—ORDRE,—INSCRIPTION DE FAUX.

—

Bolgerd a complétement acquiescé à la collocation de Wilson, il a été appelé comme partie et aurait pu faire des objections, s'il l'avait jugé convenable, à l'ordre qui a été clos définitivement et il a permis que Wilson, fut colloqué sans s'y opposer.

La tentative faite par Bolgerd de soulever la question d'authenticité de l'ordre définitif de 1853 par voie d'inscription de faux, se basant sur des allégations aussi vagues que celles qu'il a faites ne peut-être, ni admise ni tolérée par la cour.

—

MORTGAGES,—ERASURE OF INSCRIPTIONS,—ACQUIESCENCE OF BOLGERD IN THE COLLOCATION OF WILSON "ORDRE" INSCRIPTIO FALSI.

—

Bolgerd completely acquiesced in the collocation of Wilson. He was called as a party to object when the "ordre" was finally adjusted, if he saw fit, and he allowed Wilson to be collocated without objection.

The attempt by Bolgerd to open up the question of authenticity of the final "ordre" of 1853 by way of "Inscriptio falsi, upon such vague allegations as he made, cannot be countenanced or tolerated by the Court.

—

WIDOW PERROT.—Plaintiff.

versus

BOLGERD & ANOR.—Defendants.

AND

GERARD,—Intervering party.

—

Before

His Honor N. G. BESTEL, The First Puisne Judge.
His Honor J. GORRIE, The Second Puisne Judge.

—

G. GUIBERT,—Of Counsel for Plaintiff.
E. PASTOR,—Plaintiff's Attorney.

BOLGERD,—For himself Defendant.

G. GUIBERT,—Of Counsel for Gérard intervering party.
J. PIGNÉGUY,—Attorney for Gérard intervering party.

19*th June* 1872.

This is an application to obtain a Rule of Court annulling the opposition to the erasure of certain inscriptions taken by Bolgerd and his daughter Julia, and comes up on a reference from chambers.

The first inscription is in favor of Arthur Wilson of date 1st February 1842 which had been renewed on behalf of Mrs. Bolgerd on 31st January 1852, 28th January 1862, and on 25th January 1872 on behalf of Miss Julia Bolgerd.

The second inscription was on behalf of the Revd. William Corr of date 21st February 1842, and renewed of the same date as the first inscription in favor of Mrs. Bolgerd and Miss Julia Bolgerd.

These inscription affected a certain house property in Port Louis, known by the name of the "Hotel du Génie," which had been purchased by Bolgerd and wife on 22nd January 1842 from Poupinel and wife, with funds borrowed from Wilson and Corr.

On the 20th October 1846 the property was sold under a levy prosecuted by Pastor against Bolgerd and adjuged to Dr. Perrot.

At the time of the sale the claims of Wilson and Duhamel the assignee of Corr, were duly inscribed.

The final order following on this adjudication, was delayed for several years in consequence of a litigation entered by Bolgerd against Dr. Perrot, that the adjudication should be set aside, in which, however, Bolgerd was unsuccessful.

At length, however, on the 24th March 1853 the ordre was finally adjusted allocating

a sum of $ 4,354.95 to Arthur Wilson in part payment of his claim amounting in principal to the sum of $ 8,000. And ordering the erazure of those inscriptions for which no allocation was forth coming. Amongst these latter was included the inscription in favor of Corr and his assignee Duhamel.

To this final order above mentioned, Bolgerd was duly called as the party levied on and made no objections to the allocation to Wilson and the erazure of the other inscriptions.

It so happened, however that on 15th November 1846, Wilson and Duhamel transferred to Mrs. Bolgerd their claims resting on the " Hotel du Génie " for the amount of the same, giving her to the year 1847 to pay the amount stipulated in the " transport."

Taking his stand upon this document, Bolgerd for himself, and his daughter Julia, have taken the renewals of the Inscriptions above mentioned in favor of Wilson and Duhamel and insists upon the rights which these creditors had over the " Hotel du Génie."

It is abundantly clear, however from the whole course of the proceedings, that Mrs. Bolgerd was unable to implement the transfer from Duhamel and Wilson in 1846, and that the document became a dead letter.

It was long afterwards that the " ordre " was opened for the disposal of the price paid by Dr. Perrot and on the 19th March 1851 when the party prosecuting the " ordre " took out a certificate from the conservator, there was no Inscription in the name of Mrs. Bolgerd. The claim still standing in the names of Wilson and Duhamel.

Again, as we have seen when the " ordre " was finally ajusted and Bolgerd was called as a party to object, if he saw fit, it was Wilson who was collocated without objection for a portion of his claim, and the Inscription in the name of Corr and Duhamel was ordered to be erased.

If any thing more were necessary to show that Bolgerd completely acquiesced at that time to the collocation of Wilson it may be found in his subsequent adoption of the ordre of 1853 as that which was to regulate the accounting between him elf and the heirs of Wilson and of Duhamel.

Bolgerd indeed now contends that the ordre of 1853, was as regards him, simply a judgment by default, and that not having been followed up within the time required by law, it is not now operative.

The attempt by Mr. Bolgerd to open up the question of the authenticity of the final ordre of 1853 by way of *Inscriptio falsi* upon such vague allegations as he has made, cannot be countenanced or tolerated by the Court.

It is needless to say that such a contention as this, cannot be listened to, being, as it is, directly opposed to the letter and spirit of the law regulating the disposal of real property.

Were we even to assume the existence and validity of the privilege set up by Bolgerd and his daughter, it is self evident that they should have produced their title to be paid by preference to Arthur Wilson and Albert Duhamel when summoned to do so either at the opening of the ordre by the Master, or when summoned to take cognizance of the Master's provisional ordre, and to contradict the scheme of the distribution proposed by the Masters of the purchase price of the " Hotel du Génie " finally adjudged to Dr. A. Perrot.

The defendants did neither the one, nor the other. The " cloture " of the ordre was pronounced by the Master, and the erazure of those Inscriptions which did not come " en ordre utile," owing to the insufficiency of funds, were necessarily and legally ordered by the Master to be erased.

No appeal was made within the prescribed time, from this order of the Master whether by Mrs. Bolgerd, or her present representatives, the defendants. She, and they have allowed Dr. Perrot to pay the Bordereaux of collocation delivered upon him by the Master, and they now seek to recover a position which they have lost, through their own laches, to the prejudice of the Plaintiff or purchasers and of the intervening party.

This could not be allowed even were their claim less baseless than we believe it to be, and the prayer to this Court for the erazure of the following inscriptions, viz:

1o. An Inscription taken in Vol. 42 No. 470 on 1st February 1842, renewed in Vol. 73 No. 99 on 31st January 1852 Vol. 186 on behalf of Marie Aurelie Collet the wife of Charles Bolgerd as holder of the right, of the said Arthur Wilson and also renewed on January 1872 in favor of Miss Julia Bolgerd

2o. An Inscription taken in Vol. 42 No. 470 on 1st February 1842, on behalf of William Corr must be allowed.

The opposition put by the Defendants in the hands of the conservator of mortgages is accordingly set aside and the conservator is hereby authorized to erase the Inscriptions

referred to in the opposition by them lodged as above. Costs in favor of widow Perrot, and Gerard, against Charles Bolgerd, Miss Julia Bolgerd to pay her own costs. She having consented by the mouth of her attorney to abide by the decision of the Court.

SUPREME COURT.

—

CERTIORARI, — AFFAIRE STIPENDIAIRE, — ENTREPRENEUR,—CONTRACT DE SERVICE, —GARANTIE DU PROPRIÉTAIRE,—RENVOI DE L'ENTREPRENEUR,—FORME DU CAUTIONNEMENT.

—

Le mandat qui a été donné à couvert tout ce qui a été fait dans cette affaire et doit-être obligatoire pour les plaignants.

L'on ne s'est pas écarté en substance de l'acte de cautionnement, dans cette affaire ; Il y a peu de cas, ou ces actes ne peuvent être enfreints, on doit donner a ces actes une certaine élasticité en pratique.

Sans le consentement de toutes les parties y compris celui des laboureurs, donné d'une manière légale, devant le Magistrat le contrat est nécessairement obligatoire pour tous, pendant le temps pour lequel il a été fait.

—

CERTIORARI,—STIPENDIARY MATTER,—JOB-CONTRACTOR,—CONTRACT OF SERVICE,—QUARANTEE OF THE PROPRIETOR,—DISMISSAL OF JOB CONTRACTOR,—FORM OF SCEURITY BOND.

—

The mandate, that was given, quite covered all that was done in this case and must be binding upon the plaintiffs.

There was no substantial departure from the form of security bond, in this case, there are very few cases were such Schedules cannot be transgressed. A certain amount of elasticity must be accorded to them in practice.

Without the consent of all the parties to the contract including that of the laborers, given in the legal way before the Magistrate, The contract is necessarily binding upon all the parties during the whole term of its endurance.

CHARLES, VICTOR, HIPOLYTE LANGLOIS & ORS,—Appellants.

versus

RENOUF,—Respondents.

—

Before

His Honor SIR C.F. SHAND KNIGHT, Chief Judge.
His Honor N. G. BESTEL, First Puisne Judge.

—

ED. DE LAPEYRE,—Of Counsel for Appellants
C. ROUSSET,—Appellant's Attorney.

L. COX, Act. Sub. Proc. & Adv. Gen.—Of Counsel for Respondent.
J. BOUCHET,—Attorney for Respondent.

19*th June* 1872.

This was an application on behalf of Charles Victor Hippolite Langlois and others, the owners of the St. Medard Estate in the District of Pamplemousses for a writ of *Certiorari* to remove into the Supreme Court a certain Record of conviction or order under the hand of Mr. Charles Renouf the Stipendiary Magistrate of the District made on or about the 18th of last month, and all the proceedings upon which the same was founded, in a matter wherein the Indian Dabedoyal No. 2643 and some 50 others were plaintiffs as complainants and Zoile Charlot and the owners of the said Estate were Defendants. By the conviction or order in question, the owners of the said Estate were condemned jointly and severally with the said Zoile Charlot to issue to the said complainants 15 days rations as due by them in terms of their contract of service, and it was farther ordered that the men do return to their work on the said Estate.

Cox Sub. Proc. Gen. for the respondents stated that he was ready to proceed with the discussion of the case and that all the papers and proceedings were already on the table of the Court.

The Court accordingly at once held the writ as issued, the return as made, proceeded to hear the case and pronounced the following.

JUDGMENT.

From the evidence which has been submitted in this case, it appears that on 6th March last a contract of service was entered into for

the Estate " St. Medard " in the district of Pamplemousses, in the presence of the Stipendiary Magistrate, between Zoile Charlot, a Job-Contractor for the said Estate and 49 of the Indian labourers, the present respondents, whereby it was agreed that the said Charlot should hire the services of the said Immigrants, and the said Immigrants bound themselves to render to him their services in the capacity of laborers for 12 calendar months the said Charlot paying the wages and rations as therein stated with proper lodging and medical care ; It was farther covenanted that if the said Charlot should at any time employ the said Immigrants on any other estate than St. Medard and situated within the said District except with the consent of the said Immigrants given in the presence of the Stipendiary Magistrate of the said district, the present contract should *ipse facto* become null and void. Of the same date Mr. Louis Langlois for the proprietors of the estate granted in the presence of the Stipendiary Magistrate an undertaking under Schedule A. of Ord. 7 of 1865 in the following terms : " whereas certain Immigrants from India, " whose names are appended hereto have en- " tered into a contract of service as agricul- " tural laborers for the period of twelve " months with Zoile Charlot, Job-Contractor, " residing at Pamplemousses, which said " contract is dated the sixth day of March " 1872."

" And whereas it has been agreed between " the said Job-Contractor and me Hippolyte " Langlois & Co. proprietors (or lessee or " administrator) of the Estate of " St. Me- " dard " in the District of Pamplemousses, " that the said laborers shall be employed in " agricultural labor on the said Estate for the " whole time of the said contract."

" Now this is to witness that I do hereby " oblige myself jointly and severally with the " said Job-Contractor for the wages, rations, " lodging and medical care of such of the " said laborers as shall be employed as afore- " said and during the whole period of such " employment, but provided that the amount " payable by me under this guarantee shall " not exceed four thousand one hundred and " sixty four dollars which I hereby declare to " be the sum payable by me to the said con- " tractor under the contract between us, for " the work performed by the said laborers."

By another contract dated 15th March last, 4 other Indian Immigrants engaged themselves as laborers to the said Job-Contractor for the said Estate for eleven calendar months and 20 days, their engagement to terminate on the 14th March (sic) in the year 1873. The contract otherwise was identical with the former one, *mutatis mutandis*, and a similar guarantee by the proprietors was given as under the other contract.

Early in the month of May thereafter (10th) the manager of the Estate " St. Medard " intimated to Zoile Charlot in writing that as he neglected properly to superintend his men upon the Estate, and as their work was badly done, from the first of the said month of May he would not consider (accepter) him as any longer Job-Contractor for the Estate. Some attempts appear to have been made to transfer the Band to another estate but this was not accomplished.

On the 6th May the Indians complained to the Stipendiary Magistrate against Charlot and the owners of the Estate " St. Médard " that they were refused work and that their usual rations had been refused on the previous Saturday the 4th May. Before the Magistrate the Job-Contractor admitted his liability to the complainants but stated that the proprietors of " St. Medard " had refused to give the men work and rations, tho' he had several times applied for them. After hearing parties and taking evidence, the Stipendiary Magistrate on 18th May condemned the Job-Contractor and the securities jointly and severally to issue to the complainants the 15 days' rations due to them, and ordered that the men should return to their work on the Estate."

We have been asked in this Court to quash this judgment on several grounds. In the first place it was argued that Louis Langlois who acted for the proprietors of the Estate " St. Medard " had authority only to agree to the transfer of the Indians to the Estate, not to their support. The words of his mandate are the following : " Nous propriétaires " de la propriété " St. Médard " donnons " pouvoir à Monsieur Louis Langlois, admi- " nistrateur de cette propriété de faire trans- " férer l'engagement des Indiens de Mr. Zoile " Charlot pour la propriété St. Medard " quartiers des Pamplemousses."

These words are very general and broad. The mandatory in all that he did only took the necessary steps for the legal transfer of the Indians to the Estate as laborers. The mandate quite covered all that he did for accomplishing its object and his acts in such a question as the present must be binding upon his constituents. If Langlois had exceeded his powers, (which we have found he has not) under the exceptional system of contracts with Indian laborers existing among us, the givers of the powers ought to have applied to the Stipendiary Magistrate to cancel the contract between parties for want of

authority. By not doing so it may not unreasonably be argued that they have ratified the act of Langlois and cannot now be heard to complain. Even if there had been want of authority on his part. This objection cannot be maintained.

It was farther contended that the Magistrate had no power to alter the form of the Bond of security to be given by the proprietors under Schedule A. of the Ord. No. 7 of 1865 on comparing what was actually done in this case with the Schedule, we can find no substantial departure from its form. There are very few cases where such Schedules must be so judicially followed as if they laid down hard and fast lines, which cannot be transgressed with impunity in the smallest particular, a certain amount of elasticity must be accorded to them in practice, and in the matter now before us the ordinance itself tells us that " the guarantee shall *as nearly as may be* in the form of the Schedule." This objection must share the fate of the former.

3o. It was argued that the contract was annulled by what passed between the proprietors and the Job-Contractor. The owners were dissatisfied with him, and the work of his laborers and they told him, his and their services were no longer required. There was no contract between the Indians and the proprietors of the Estate. This argument proceeds upon a misapprehension of the law, It entirely ignores the presence of the Indians in the contract. In law the owners are bound to them equally as the Job-Contractor is the guarantee required by the law, is a statutory guarantee explained in Art 7 of Ord. No. 7 of 1865 to be " by way of a joint and seve-" ral obligation on the part of such owner or " lessee along with the Job-Contrator for pay-" ment of the wages, rations, lodging, and " medical care, of the said laborer during " such time (not being longer than that men-" tioned in the contract of service) as he shall " be employed in working for the said owner " or lessee."

That period of duration was, as we have seen 12 months in the one case and 11 months and twenty days in the other, without the consent of all the parties to the contract including that of the laborers given in the legal way before the Magistrate or a dissolution of the contract or cause shewn by before a competent Court of law, the contract is necessarily binding upon all the parties during the whole term of its endurance. No dissolution of the contracts has here taken place, they are still binding upon all the parties during the whole term of their endurance.

The Judgment of the Court below must therefore be affirmed, the Complainants must return to their work on the " St. Médrrd " Estate and additional rations must be issued to them down to the time when this Judgment shall take effect. With costs against the Respondents C. V. H. Langlois and others.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT, PLAINTE MAUVAISE EN DROIT PARCEQU'ELLE A ÉTÉ FAITE NON SOUS SERMENT, MAIS SOUS AFFIRMATION SOLENNELLE, AUTREFOIS ACQUIT, PEINE.

—

La plainte qui dès le principe a été faite sous affirmation solennelle peut être maintenue, le plaignant ayant été postérieurement assermenté

La première plainte avait été entrée par un Sergent Major de Police & non pas comme dans l'affaire actuelle par un particulier. Dans la première plainte l'agression avait eu lieu avec préméditation et guet-à-pens, circonstances dont il n'a pas été fait mention dans la seconde. Les deux affaires ne sont pas les mêmes. Les accusations ne sont pas identiques.

Il a été clairement établi que dans toute cette, affaire l'Appellant a été l'agresseur & que l'outrage a été commis dans les limites d'une cour de justice.

—

APPEAL FROM A CONVICTION OF DISTRICT MAGISTRATE, INFORMATION BAD IN LAW, NOT BEING TAKEN UPON OATH, BUT UPON SOLEMN, AFFIRMATION, AUTREFOIS ACQUIT PUNISHMENT.

—

The information, though at the outset bears to be an information upon solemn affirmation, may be sustained, the complainant having afterwards taken his oath.

The information was preferred by a Serjeant Major of Police the first time, and not as in the present case by a private party—The assault in the first case was said to have been committed with premeditation and lying in wait, and such is not the case in the second information—the two cases are not the same, the charges are not Identical.

It is clearly established that in the whole affair, the Appellant was the aggressor and that this grave outrage was committed within the precincts of a court of justice.

CONSTANTIN,—Appellant.

versus

THE QUEEN,—Respondent.

Before

His Honor Sir C. FARQUHAR SHAND, KNT. Chief Judge.

—

E. PELLEREAU,—Of Counsel for Appellant.
J. A. ACKRYOD,—Appellant's Attorney.

L. COX, ACT. SUBS. PROC. GEN.—Counsel for Respondent.
J. BOUCHET,—Attorney for Respondent.

28th June 1872

This was an appeal from a sentence of the District Magistrate of Savanne condemning the Appellant to two months' imprisomnent with payment of costs for assaulting one F. Lelong.

The grounds of appeal pleaded at the bar were three in number :

1o The Information was bad in law as it was laid not upon oath but upon solemn affirmation.

2o. " Autrefois acquit." The accused had been tried before for the same offence substantially, and been acquitted, he ought therefore on that ground to have been at once discharged on the present occasion.

3o. In any view, the punishment awarded by the Magistrate was excessive and ought to be reduced :

THE COURT.

As to the first contention of the Appellant, looking at section 6 of the Ordinance 35 of 1852 and Schedule A. of Form No. 1 thereunto appended I think that the information in this case may be sustained, at the outset it bears to be an *information*, upon solemn affirmation, but then it is afterwards stated that the informant, the party who complains of being assaulted, maketh oath and saith as follows &c.

The information is certainly not consistent in what it states as to the solemnities observed in its preparation, but the law itself is neither well nor clearly expressed, and I think that the information substantially contains, tho' in a clumsy way, all the ingredients necessary to give it validity. It will also be noted that the information was duly pleaded to by the accused and the trial proceeded without objection to the form of the writ, the first objection will be repelled.

It is true that the Appellant was tried before, for his connection with the same affair but on that occasion the information was preferred by the Sergeant Major of the Police of the District, not as in the present case, by the private party who complained of having been assaulted. Again the assault as charged in the former case was said to have been committed " with premeditation or lying in wait " whether, therefore, this addition to the information is to be considered in legal logic as of the essence or of the accidents of the offence charged, it is not easy to see how it can be maintained that we have here a case of *Bis in idem*, for the two cases are not the same, the charges are not identical.

At the same time it is plain that the matter to be inquired into arose generally out of the same transaction, and it was urged by the Appellant with considerable force that as the accused could have been punished for simple assault under the first information, altho' the aggravation of premeditation or lying in wait was not established, he could not now be tried and punished for simple assault as he held an out and out acquittal at the end of the first trial.

There is considerable plausibility in this view. The Crown indeed maintains that whatever the power of the Supreme Court may be to sentence persons for simple assault, when aggravations such as those set forth in the first case have not been established in evidence, the District Courts have no such power but must categorically acquit or convict the accused of the whole charge as laid in the information. I should be sorry to find that this is in reality the law of the Colony for it is very important that District Courts as well as the Supreme Court should be entitled to find a charge established without the aggravations and at once proceed to judgment according to the real justice of the case, and without the delay and expense of a new trial. In the present case I do not find it necessary to say anything to throw doubts on the District Magistrate's power of so acting when the occasion arises,—for I do not think that the contention of the Appellant in this part of the case can be listened to, in the peculiar circumstances which present themselves here for consideration. In the first case, it must be

remembered that the now Appellant contended with success, that he was entitled to a complete acquittal from the whole case, and could not be competently convicted and punished for simple assault as the whole charge including the aggravations laid in the Information was not supported by the evidence. In the present case and before the same District Court, he has argued directly the reverse, contending that he could have been competently convicted and sentenced under the first information that he ought to have been so convicted and punished, and that on this ground he is entitled in the present case to be at once acquitted. In this way, by a sort of juridical juggle, and by blowing hot and cold, to use a common expression (as suits his convenience) the Appellant attempts to escape all farther enquiry into the truth of the charge preferred against him. This cannot be permitted. The case, I think, comes within the maxim *allegans contiarici non est audiendus.* The Appellant having gained an advantage by a certain plea in the first case, is not entitled to maintain the precisely opposite argument in the hope of benefiting himself in the second. I cannot therefore give effect to the second ground of Appeal.

3. As to the third plea raising the question of the amount of punishment, I think it is clearly established that in the whole affair the Appellant was the aggressor. The dispute arose about a case before the Stipendiary Magistrate of a boy who left the service of Lelong to go into the Appellant's employment. It was the Appellant who began the mischief by the use of abusive and injurious words and this he followed up by attacking Lelong with his fists. It is true that his opponent met his injurious expressions by similar abuse, and when he was struck by the Appellant, he defended himself in the same way as he was assaulted viz. with his fists. Lelong had the worst of the scuffle. He got a cut on his head caused by his falling on a stone, and had several contusions and cuts on his face. The Medical man who examined him says that the injuries received by him were followed by no illness or serious consequences but he did not visit Lelong until nearly a week after the fray. The Appellant received a blow in the face and had his clothes torn.

It is plain that in such a case a party who has behaved himself in the way the Appellant has done, must be punished and severely punished.

Looking at the circumstances generally and particularly at the fact that this grave outrage was committed, within the precincts of a Court of Justice, I do not feel myself called upon to interfere with the Judgment of the District Magistrate.

The Appeal will therefore be and is hereby dismissed with Costs.

SUPREME COURT.

—

SAISIE DE LOYERS,—ACTION EN NULLITÉ TITRE LIQUIDE,—JUGEMENT PAR DÉFAUT FAUTE DE CONCLURE,—SA DURÉE.

—

Un jugemcnt par défaut faute de conclure est assimilé a un jugement contradictoire, qui contrairement au jugement ordinaire par défaut contre une partie qui n'avait pas fait de comparution, demande a être exécuté dans les six mois.—La loi met le jugement par défaut faute de conclure sur le même pied qu'un jugement contradictoire & il peut être exécuté dans les trente ans.

—

SEIZURE OF RENT,--ACTION IN NULITY THEREOF LIQUID TITLE,—JUDGMENT BY DEFAULT FAUTE DE CONCLURE—DURATION THEREOF.

—

A Judgment by default faute de conclure, is assimilated to a contradictory judgment which unlike the common judgment by default given against one who never entered any appearance whatever, required an execution within the six months ; but by law is put on a par with a contradictory judgment and may be executed at any time within thirty years.

—

LEGUEN & WIFE & ORS,—Plaintiffs.

versus

ROCH CHARLES BUTTIÉ THE FATHER, —Defendant.

Before

His Honor N. G. BESTEL, Fist Puisne Judge.
His Honor J. GORRIE, second Puisne Judge.

—

L. ROUILLARD,—Counsel for Plaintiffs.
L. WORHNITZ,—Attorney for Plaintiffs.

P. L. CHASTELLIER,—Of Counsel for Defendant.
G. RITTER,—Defendant's Attorney.

26th July 1872.

The Plaintiffs alleging themselves to be creditors of the Defendant seized in the hands of Donald de Rochecouste the lessee of thirty acres of land or thereabouts the rent due by de Rochecouste for the use of the said thirty acres of land of which the Defendant has the usufruct

On being called to show cause at chambers against the validity of the said attachment, Chastellier for Buttié the Defendant objected to the validation prayed for. Whereupon parties were referred to the Court.

On the day the objection was heard in Court Chastellier stated that the rent seized had been previously attached in the hands of de Rochecouste by one Fonrose. Cazalens who having seized the land rented by de Rochecouste had thereby seized the rent. He argued however that the attachment of plaintiffs was bad in law having been laid without any liquid title and without any Judges order to that effect.

The title set up in support of the attachment is null and void in law. It was a judgment given by default against Buttié, which ought to have been executed within the six months (Rule 77). Not having been so executed the judgment necessarily lapsed, and cannot be available for the purpose of upholding the attachment laid.

There being no Judge's Order authorizing the attachment of the monies in the hands of De Rochecouste it necessarily followed that on this ground as well as the one above stated the Attachment must be annulled and set aside by the Court.

Rouillard for Plaintiffs denied the inference drawn by Chastellier and contended on the strength of the text of Rule 77 that the judgment obtained against Buttié was not such a judgment by default which required for the maintenance of its existence, execution within the six months. It was in truth a judgment by default in so far as that Buttié had not filed his plea at the Registry within the time required. But on the service of the Rule calling upon him to shew cause why judgment should not be signed against him for want of a plea. Buttié applied and obtained from the Court leave to file a plea within a certain delay. Not having availed himself of the leave granted him, judgment was signed against him. This judgment though by default, has nevertheless the force of a final judgment.

The default was given against one who had appeared to the action, by an Attorney who had instructed Counsel to move for leave to Buttié to file his plea. The judgment so given is one which in our Colonial practice is styled : *Jugement par défaut, faute de conclure.* Such a judgment is assimilated to a contradictory judgment, which unlike the common judgment by default given against one who never entered any appearance whatever required no execution within the six months, but by law is put on a par with a contradictory judgment, and may be executed at any time within thirty years.

Rule 77 far from militating against this view of the law is in support of it. It is thus worded " whenever such judgment shall " have been given or order made on default " without appearance, a *any proceedings equi-* " *valent thereto*, such judgment shall not be " susceptible of opposition &c., and the levy " must be made within six months, from the " date of the judgment failing which such " judgment shall cease to have effect " In order that the judgment should be by default there must not only be *no appearance*, but also *no proceedings equivalent thereto.*

True it is that Buttié did not originally appear to the action, in as much as he had not filed his plea at the Registry within the five days from the service of the declaration (Rule 20.)

But on the service of the Rule nisi delivered by the Registrar (Rule 21) Buttié moved the Court by Counsel who must have been necessarily instructed by an attorney retained by Buttié for leave to file his plea. To do all this, he must necessarily have appeared in Court if not in his own proper person at least *by attorney.*

If this motion of his in Court be *no appearance* surely it is at least *a proceeding equivalent thereto.*

If so the judgment is one not by default, but after appearance and contradictory, requiring therefore no execution within six months. It could not lapse but was in full force when the attachment was laid, and will continue so for thirty years and like any other contradictory judgment to which it must be assimilated to all intens and purposes for the reasons above stated.

JUDGMENT.

This is we believe the first time that the question now before the Court has been mooted since the promulgation of our Rules of Court.

Its importance must not be underrated. If the judgment be by default of course the attachment cannot stand. But if the judgment be one of the class of judgments known in our colonial practice under the denomination of *judgment by default faute de conclure*, this kind of judgment being on a par with a contradictory judgment, may, as such, be executed at any time as all contradictory judgments (viz:) within thirty years from the date thereof. In this case the plaintiff would have a sufficient title for the validity of the attachment.

As justly observed by Rouillard, Buttié not having filed his plea, within the five days in answer to the declaration served upon him is to be considered not to have appeared, but on the service of the rule nisi he appeared in Court, made a motion by Counsel who must necessarily have been instructed by an Attorney retained by Buttié for leave to file a plea within a certain time. Buttié had then full knowledge of the demand directed against him, and might have availed himself of the delay granted him to file any defence he might have to urged against such demand. His having filed no defence was not the result of his ignorance of the existence of the demand made against him. Can he or ought he to be allowed by his laches to curtail the rights of plaintiffs, by reducing a contradictory judgment to the level of a mere judgment by default?

An ordinary judgment by default is one in which no appearance of any kind has been entered, in which case it is absolutely requisite for its producing its effect that the judgment so given should be brought within six months to the knowledge of the defaulter by a levy of his goods and chattels by an officer of the Court specially to be appointed by the latter, therely to make sure that the defaulter has been made aware of the proceedings had against him and to place him in a position to protect himself against any illegal measures which may have been, or which might hereafter be taken against him.

This is the only reason why the law requires that the judgment by default shall be executed within six months.

But this reason does not apply to a judgment by default *faute de conclure*. The defendant has appeared and obtained an extension of time to file a defence to the action of which he had had due notice. He did not choose to avail himself of the time so granted him for the purpose. The inference to be drawn from his silence is that he had no defence to urge, and the judgment given in his absence, may very rightly be put on a level with a contradictory judgment and may be executed like all other contradictory judgments at any time within thirty years from its date.

The construction put by plaintiff upon the wording of Rule 77 would render it nugatory. The rule requires that no *appearance*, or any *proceeding equivalent thereto* should have been made or taken to empower the Court to deal with any case by default. What proceeding is *more equivalent to an appearance* than the coming of a defendant into Court moving by Counsel instructed by an attorney retained by the defendant for an extension of time for the purpose of filing his plea to the action.

To do so he must have received a copy of the demand. He knew what was demanded of him, and if he did not avail himself of the leave granted, he had but himself to blame and must bear the consequences of his own laches, one of which is that the judgment given is in law not a judgment by default, but one *faute de conclure* by the Attorney, and as such equal in its duration and effects to a contradictory judgment (viz:) 30 years.

The plaintiff having therefore a good title for laying the attachment, we shall and do therefore declare the attachment so laid by them good and valid without costs this being the first time the point now decided by the Court having been taken.

BAIL COURT.

—

CONTRACT,—VIOLATION DE CONTRACT,—DOMMAGES,—PREUVES.

—

Circonstances dans lesquelles il a été décidé qu'une personne qui avait entrepris de réparer une maison pour un prix convenu au contrat, mais qui avait été empêchée sans cause suffisante, par celle qui l'employait, d'exécuter ce contrat, avait droit au prix du travail fait et à des dommages-intérêts.

—

CONTRACT,—BREACH OF CONTRACT,—DAMAGES,—EVIDENCE:

—

Circumstances in which a party undertaking to repair a House for a stipulated price

SUPREME COURT OF MAURITIUS.

His Honor Sir C FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master,
J. A. ROBERTSON, Esq., Substitute Master,
F. HERCHENRODER, Esq., Registrar
L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
J. H. SLADE, Esq., Registrar.
JAMES BROWN, Substitute Registrar.
J. BOUCHET, Queen's Proctor.
G. A. RITTER, Marshall.

COURT OF BANKRUPTCY.

JUDGES :—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E,	1828	Jenkins, T. L.	1865	Brown, R. M.	1870
Campbell, C. M.	1841	Florent, E	1865	Lionnet, F.	1870
Naz, Hon. V.	1857	Lionnet, H.	1866	Ollier, R.	1870
Bazire, E	1858	Lapeyre, A. E.	1866	Poulin, F.	1870
Leclézio, E J	1858	Desmarais, E.	1866	Forget, A.	1870
Pellereau, E.	1860	Bazire, E.	1867	Thibaud, L. A.	1871
Martin Moncamp, P. G	1861	Galéa, H.	1867	Pelte, E.	1871
Rouillard, L	1861	Lemière H	1868	Desenne, O	1871
Wilson, H.	1863	Avice, H	1868	Boucherat	1871
Chastellier, P. L	1864	Beaugeard, P.	1868	Galais, E.	1871
Delafaye, V.	1864	Pilot, G.	1868	Mathews, L. F.	1872
Guibert, G.	1864	Vaudagne, E.	1868	André, A.	1872
Newton, W.	1864	Hamon, A.	1869		
Lepoigneur, I.	1864	Serret, E.	1869		

ATTORNIES (actually practising).

Pastor, E	1840	Herchenroder, T.	1860	Halais, J.	1865
Mercier, J.	1840	Laval, V.	1860	Sauzier, M.	1866
Lalandelle, G.	1842	Chazal, P. E. de	1860	Sauzier, E.	1866
Hewetson, W.	1846	St Pérne, E. P	1860	Commarmond, A	1867
Laurent, E.	1846	Tessier, G	1860	Robert, A	1868
Ducray, E.	1848	Victor, F.	1860	Desjardins, E.	1870
Hitié, U.	1850	Mallet, F.	1861	Rousset, C.	1870
Pignéguy, J.	1850	Ducray, V. G.	1861	Wohrnitz, L.	1870
Pastor, H.	1850	Gautray, C.	1861	Erny, P. J. A	1871
Colin, A J	1851	Sicard, N.	1862	Rolando, A	1871
Pragassa, V	1851	Simonet, F.	1863	St. Pern, L. de	1871
Guibert, J	1853	Pitot, A	1863	Ganachaud, E.	1871
Finniss, W.	1853	Bétuel, A.	1863	Ellie, J.	1871
Slade, J	1853	Boullé, V.	1863	Lastelle, F.	1872
Bouchet, J	1853	Rodesse, L. C.	1863	Edwards, E.	1872
Duvivier, Ed.	1853	Ritter, G A	1864	Leblanc, W.	1872
Robert, F.	1857	Perrot, A	1864	Margeot, E.	1872
Ackroyd, J	1859	Rohan, A	1864		
Desperles, L	1859	Gilot, F	1865		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 5.

CONTENTS:

EDITED BY E. DE LAPEYRE

BARRISTER AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY,—9, BOURBON STREET.

1873.

and who was, without sufficient cause prevented by his employer from completing the contract, was found intitled to the price of the work done and to Damages.

—

MICHEL,—Plaintiff.

versus

ROHAN,—Defendant.

—

Before

His Honor Sir C Farquhar Shand Knight
Chief Justice,

—

G. Guibert,—Of Counsel for Plaintiff.
A. Piston,—Plaintiff's Attorney.

E. Pellereau,—Of Counsel Defendant.
A. Rohan,—Defendant's Attorney.

—

19*th July* 1871.

In this case the plaint set forth that " by a " deed under private signatures dated 13th " November last, it was convenanted between " the Defendant and the Plaintiff" that the Plaintiff should make for the account of the Defendant to a house situate in David street, and belonging to several chinamen, certain repairs: viz. all the repairs which the said house was then wanting.

That it was further agreed, that the Defendant should furnish the wood necessary for such repairs and should pay the price of the repairs, at the rate of four cents of a dollar for each foot of plank, or piece of wood repaired.

That the Plaintiff in execution of the agreement immediately set to work and continued the repairs up to 29th November in a fair workman like manner *selon la règle de l'art.*

That on that day in the morning when the Plaintiff and his workmen arrived at the house to continue the repairs, the Defendant prevented the Plaintiff and his workmen to set themselves to work.

That altho' summoned by the Plaintiff, to allow him and his workmen to continue the repairs, the Defendant has always prevented them so to do.

That these facts constitute a breach of the contract entered into between parties.

That the Defendant is due to the Plaintiff the sum of seventy five dollars for balance of the work already done to the said house, and that if the Plaintiff had been allowed to complete the repairs he would have realized a benefit of four hundred dollars.

The Defendant was therefore summoned to shew cause why Judgment should not be given against him for the aforesaid sums of seventy five dollars for work and labor done and of four hundred dollars for damages.

The defence was that the work performed by the Plaintiff was badly done, that he refused to follow the directions of the Defendant in the order of executing the different portions of the work, and that therefore he was dismissed from the work.

The parties themselves and a number of witnesses on both sides were heard in Court after a careful consideration of all the evidence, I am satisfied that the Plaintiff is entitled to succeed, to a modified extent, in this action but not to receive all he asks for.—It is established by the proof that the Defendant and certain parties interested in the building, Chinamen, were constantly on the premises during, the operations of the plaintiff, saw all that was going on and never expressed any serious dissatisfaction with the repairs executed by the Plaintiff, till he had worked on the premises for a period of between 2 and 3 weeks.

The Defendant then found fault with some of the old boarding having been replaced by the Plaintiff without being freshly cut and neatly adjusted; he complained that he was paying too high a price to the Plaintiff and ordered him to cease proceeding with the Job.

I do not find that the defendant on the evidence adduced, can justify those proceedings. If he was really satisfied that the Plaintiffs' work did not come up to what he was entitled to look for under the contract, he should have got the building in the regular way examined by neutral experts and not taken the matter as he did very much in his own hands. He was not entitled with impunity to deal with the plaintiff in the abrupt manner which he adopted.

The circumstances did not warrant the conduct of the Defendant.

Of the price of the work actually completed by the Plaintiff, there remained due to him at the time he was made to cease working the sum of $ 42.72.

It is not easy to fix what damages the plaintiff has sustained by the conduct of the defendant, as the profit under such contracts seems, according to the evidence of different witnesses to vary very much. A slump price per foot was to be paid, overhead, while the witnesses inform us that some parts of the work cost much more than others and taken by themselves would give little or no profit.

On the whole, I think the plaintiff will be properly remunerated by being allowed $ 130 in addition to the above sum of $ 42.72. For the aggregate amount viz : $ 172 72 Judgment is now given in the Plaintiff's favor with costs.

MAURITIUS SUPREME COURT.

Notary.—Cession of account for business, by a Notary after he has ceased to exercise his profession. Claim of the account by the cessionary. Privilège of Notaries to recover their accounts. The debt incurred for the preparation of deeds connected with a sale payable by the purchaser under Art. 1593 C. C. and not by the seller. Solidarity of the buyer and seller with regard to the Notary. Account cannot be claimed but by the successor of a Notary. Code Decaen. Notary's Ordinance Arts. 48 and 49. Novation. Long delay.

As a general rule every right in commercio is capable of being assigned to a third party, and according to the liberal aim and genius of the Civil Code, the accessories are usually held to go with the principal.

The mere fact that the notary ceased to be a notary before he conveyed his right to the claimant makes no material difference in the application of the law.

In questions between buyer and seller, the expense of the deed of sale falls on the purchaser, but in this case the claim is that of the notary employed by the parties to the sale and primâ facie, at lease both are liable to the notary, leaving them to settle the matter between themselves, in terms of law.

It does not appear that in the present case a novation at law has taken place, the facts do not warrant the conclusion that all recourse by the creditor was abandonned as against the present defendant, and that the late Pierre Philippe was adopted as the sole and only debtor. It will be remarked that both parties were originally equally bound in solido, their liability was joint and several; the authorities on the point, that both parties to a deed are solidarily liable to the notary who draws it up, are overwhelming.

The lapse of time before the suit was instituted is a feature is this case. And had this been a question of cautionry, the argument of the Defendant that owing to the delay in insisting for payment the security had lost effectual recourse against the principal, would have been worthy of more attention, but as the case stands, it cannot liberate the Defendant.

Notaire.—Cession de compte pour travail fait par un Notaire après qu'il a cessé d'exercer sa profession. Réclamation du compte par le cessionnaire. Privilège des Notaires pour recouvrer leurs comptes. La dette encourue pour la rédaction des actes de vente est payable par l'acheteur et non par le vendeur. Art. 1593. Code Civil. Solidarité du vendeur et de l'acheteur vis-à-vis du notaire. Le compte ne peut-être réclamé que par le successeur du Notaire. Code Decaen. Ordonnance sur les Notaires Art. 48 et 49. Novation. Long délai.

En règle générale tout droit dans le commerce, peut être transféré à un tiers, et daprès le but libéral et le génie du Code Civil les accessoirs suivent toujours le principal.

Le fait seul qu'un notaire a cessé d'être notaire avant d'avoir transféré ses droits au plaignant, ne cause pas de difference matérielle dans l'application de la loi.

Dans les questions entre vendeur et acheteur les frais de l'acte de vente sont supportés par l'acheteur, mais dans cette affaire la réclamation est celle du notaire employé par les parties à la vente, et de prime abord, du moins, toutes deux sont responsables vis-à-vis du notaire, à elles à s'arranger entre elles, suivant la loi.

Il ne paraît pas que dans cette affaire l'on ait fait une novation en droit, les faits n'amènent pas à la conclusion que le créancier ait abandonné tout recours contre le défendeur actuel, et que feu Pierre Philippe ait été adopté comme seul et unique créancier. L'on remarquera qu'originairement les deux parties étaient solidairement responsables leur responsabilité était tout à la fois une

et indivisible. Les autorités sur ce point, que, les deux parties a un acte sont solidairement responsables vis-à-vis du notaire qui a fait l'acte, sont nombreuse.

Un des caractères particuliers de cette affaire, c'est le laps de temps qui s'est écoulé avant que l'action ne soit entrée. Et s'il avait été question de garantie on aurait pu certainement porter attention à l'argument du défendeur qui désait que vu le délai qui s'était écoulé avant de demander le paiement. Celui qui avait garanti avait perdu tout recours, contre le principal, mais dans l'affaire telle qu'elle est, cet argument ne peut libérer le defendeur.

—

Before:

His Honor The Chief Justice,
Sir C. FARQUHAR SHAND, Knight.

—

RAYEROUX,—Plaintiff,

versus

LECOURT DE BILLOT,—Defendant.

—

G. GUIBERT,—Of Counsel for Plaintiff,
J. GUIBRT,—Attorney for the same.
N. ARNAUD,—Counsel & Attorney for the Defendant.

—

17*th July* 1872.

This was an application for summary process to enforce payment of the sum of $147.95 c. the alleged balance of an account for business, due originally to the Notary Herchenroder duly taxed by the Chamber of Notaries and the Master of this Court and assigned by the Notary to the Plaintiff.

Several preliminary objections to the demand were stated in the outset by the Defendant.

1o. It was argued that the sum even if still owing, could not be recovered in the special way open to notaries, as they alone were personally privileged to recover their accounts by summary process, and at all events, in the present case, a summary recovery would not be open to the claimant as the cedent the original creditor had ceased to be a Notary before the Cession.

2o. That the account having been incurred for the preparation of deeds connected with a sale, is payable under C. C. 1593, by the purchaser, and not by the seller, against whom the demand is now preferred.

3o. The Notary handed over all his papers to Mr. Gimel, his successor and we must assume that this claim went with the papers; The debt can only be received, if due, by Gimel, who in law, replaces his predecessor. —Code De Caen, Notarys Ord: Arts: 48. 49:—

THE COURT.

The question in the first objection does not in the present case come before the Court, for the first time.—In the case of *Mariette versus Senèque* 14th May 1862. 2. Piston page 57 the Court sustained the title of an assignee to recover summarily an account due to a Notary for professional services.—On that occasion we said " As a general rule every right, in *Com-*
" *mercio*, is capable of being assigned to a third
" party, and according to the liberal Aim and
" genious of the Civil Code, the accessories
" are usually held to go with the principal.
" Thus by Art: 1692 it is said, La vente ou
" cession d'une créance comprends les acces-
" soires de la créance telsque caution, privilè-
" ge et hypotheque, and by the Art: 2112
" the assignees of all debts, to which certain
" very important special rights or privileges
" are given by law, are declared to stand in
" the shoes of the assignors, and to enjoy all
" their rights, (les cessionnaires de ces diver-
" ses créances privilégiées exercent tous les
" même droits, que les cédants, en leur lieu
" et place "—

I think that that case was well decided and that the principles of the decision are applicable to the question now before me. The mere fact that the Notary ceased to be a Notary in the present case before he conveyed his right to the claimant makes no material difference in the application of the law.—This view is confirmed by the cases reported in Sirey 44. 1. 502 and 54. 2, 247.

2o. As to the 2nd objection the article of the Code quoted establishes that in a question between buyer and seller, the expense of the deeds of sale fall on the purchaser but in this case the claim is that of the Notary employed by the parties to the sale, and *prima facie* at least, both are liable to the Notary, leaving them to settle the matter between themselves in terms of law.

3o. Mr. Gimel has deponed on oath that he never heard any thing of the debt in question,

that he only received his Minutes of Office from Mr. Herchenroder and nothing else.—This plea must therefore be also repelled.

The Court will be ready to hear what parties may have to say on the merits at an early sitting, all questions of costs reserved.

THE COURT.

This case has now been very fully discussed on the merits.—The main defence is based on the evidence said to be afforded by some documents submitted to the Court The first is entitled : " Etat des frais et honoraires dus à " l'Etude de Mr. Lisis Herchenroder, Notaire " par Mr. Pierre Philippe." Philippe was the person who bought the subjects from Lecourt de Billot in connection with which sale the business account was incurred to the Notary, the unpaid balance of which is the subject of the present demand, the defendant it will be remembered, was the seller on that occasion.

This Bill of Costs contained charges for various other pieces of business performed by the Notary for Philippe during the period extending from 22nd June 1858 to 30th December 1859, and amounted altogether to the sum of £309 or $ 1546.20 c.—The entry of costs for the particular sale from Lecourt de Billot to Philippe was dated 17th February 1859.

The amount was $ 147.95 c.—To account of the Bill of Costs generally the sum of $ 660 had been paid leaving a balance of $ 882.20 c.—At the foot of the account there appeared the following cession and acceptance " Je soussigné déclare céder et transporter a " Monsieur A. Rayeroux, le montant du " présent état de frais s'elevant à la somme " de huit cent quatre-vingt dix piastres et " vingt centièmes ; le présent transport est " fait pour me libérer envers lui de pareille " somme que je lui devais."—

Port Louis, 14 Juin 1860.

(Signed) LISIS HERCHENRODER.

" Accepté à payer sauf erreur à Mr. Raye- " roux et par portions qui seront fixées entre " nous."

21 Juin 1860,

(Signed) P. PHILIPPE.

This document was registered on 22nd June 1860.

A separate " état de frais " was produced, entitled " état des frais et honoraires dus solidairement par MM. François Ferdinand " Lecourt de Billot et Pierre Philippe a l'étu- " de de M. Lisis Herchenroder notaire."

It contained only the entry of the sale of 17th February 1659 and the above sum of $ 600 was admitted as received to account, leaving as unpaid the sum of $ 147.95 the amount now sued for. The last, account was taxed by the chamber of notaries on 21st April 1860 and registered on 4th April 1872. on 5th April 1872—the notary Herchenroder assigned this account to the Plaintiff on payment to him as the writing bears of the whole amount due.

In this position of matters, the defendant pleaded that on the facts now established, the plaintiff had adopted Philippe as his sole and only debtor ; that there was here a case of novation, whereby the defendant must be held to be liberated from all claims and 2nd that, at all events, the demand for payment having been so long delayed, ought not now to be admitted as Philippe had in the interval died insolvent and all recourse against him as the primary debtor had been lost to the defendant through the laches of the Plaintiff.

And 3rd. The double cession or assignation threw an air of doubt and suspicion on the whole case.

To take the latter argument of the defendant, first the double cession or assignation, by the notary to the Plaintiff which we find here is no doubt unusual, but in the peculiar circumstances which occurred in this case such a double transfer can scarcely be wondered at Pierre Philippe having died in such circumstances as prevented the chance of recovering the debt from his Estate, and the first cession not having resulted in payment to the Plaintiff the second cession for the special business account was made in a separate form, was taxed by the competent authority, and is now used as the basis of a demand against the present defendant whose separate and personal liability to pay the amount is the question before the Court.

The plea of novation was very anxiously pleaded by the Defendant and supported by a very copious citation of authorities.—Novation, as we all know can never be presumed C. C. Art. 1273 but I quite concur with the authorities referred to by the Defendant that it may exist in law when the circumstances clearly show the intention of parties, altho' the term itself has not been employed.

The word novation is not a sacramental one.—This doctrine is I think well stated by Pothier in the following words : " Nous

" ne nous sommes pas néanmoins attachés " dans notre jurisprudence, d'une manière " tellement littérale à cette loi, qu'il faille " toujours que le créancier déclare en termes " précis et formels qu'il entend faire novation " il suffit que de quelque manière que ce soit, " sa volonté de faire novation paraisse si evi- " dente, qu'elle ne puisse être revoquée en " en doute, c'est ce qu'établit Dargentré, sur " l'Article 273 de lancienne coutume de Bre- " tagne."—The observations of Duranton are to the same effect. " Comme la novation a " pour effet d'éteindre la dette, et par cela " même les privilèges et les hypothéques qui " y sont attachés, et de libérer les cautions, " elle ne se presume point, il faut que la " volonté de l'opérer resulte clairement de " l'acte.

" Dans le droit romain antérieur a Justinien, " on était très facile a admettre la novation, " mais cet impereur décida, par la loi dernière " au Code tit : *de novationibus*, que désor- " mais il n'y aurait novation qu'autant que les " parties en seraient convenues expressément " *Nisi ipsi specialiter remiserint quidem* " *priorem obligationem, et hoc expresserint* " *quod secundum magis pro anterioribus ele-* " *girint.* Toutefois l'on ne s'est pas rigou- " reusement attaché à la lettre de cette loi, ni " dans notre ancienne jurisprudence, ni dans " le Code ; on s'est contenté d'établir en prin- " cipe que la novation ne se presume pas, et " que l'intention de l'opérer doit resulter clai- " rement de l'acte.—C'est donc un point " laissé à la sagesse du juge, comme tout ce " qui concerne l'interprétation des clause " d'un contrat et l'intention qui les a dictées, " en sorte que sa decision sur ce point pourrait " bien être reformée en appel comme un *mal* " *jugé*, mais elle ne serait que difficilement " l'objet d'une censure de la part de la cour " de cassation."

It does not appear to me that in the present case a novation in law has taken place.—I do not think that the facts warrant the conclusion that all recourse by the Creditor was abandoned as against the present Defendant, and that the late Pierre Philippe was adopted as the sole and only debtor.—It will be remarked that both parties were originally bound *in solido* their liability were joint and several. The authorities on the point that both parties to a deed are solidarily liable to the notary who draws it up, are overwhelming. Sirey Code Annoté *ad.* Art. 1202 No. 22. The receipt accordingly of part of the sum due from one of the two cannot liberate the other party indeed unless, there was a clear giving up and abandonmend of all claims against him, it is a favorable circumstance for him that part of the money has been received from the other debtor, for the liability for payment of the whole which was incumbent upon the defendant is thus necessarily so far diminished.

The lapse of time before this suit was, instituted is a feature in the case, to which the Respondant naturally enough directed the attention of the Court, and had this been a question of Cautionry the argument of the defendant, that owing to the delay in insisting for payment, the security had lost effectual recourse against the principal, would have been worthy of more attention, C. C. 2037, but as the case stands it cannot liberate the Defendant. At the same time the long delay not having been entirely explained by the Plaintiff, I shall only allow him half of his taxed costs.

Judgment for Plaintiff with costs to extent of one half as they shall be taxed by the Master.

MAURITIUS SUPREME COURT.

—

Provision granted by children to their father. Alienation thereof by the father in favour of his creditors.

—

Provision faite par des enfants à leur père Celui-ci peut-il en disposer en faveur de ses créanciers ?

—

Before :

His Honor the CHIEF JUDGE,
and
The Hon. Mr. JUSTICE GORRIE.

—

J. MERCIER,—Plaintiff.

versus.

R. C. BUTTIÉ,—Defendant.

—

E. PELLEREAU,—Of Counsel for Plaintiff.
J. MERCIER,—Attorney for the same.

P. L. CHASTELLIER,—Of Counsel for Defendant
A. J. COLIN,—Attorney for the same.

—

26th July 1872.

We have found some difficulty in arriving at a decision in this case. There are points in it which appear to us to be attended with conisiderable nicety, we allude particularly to the questions, 1o. Whether the provision granted by his children in favor of Mr. Buttié, was of such a nature as not to be alienable or disposible by him in favor of Messrs Fontaine and Smith or of his creditors, and 2ndly, assuming that he had power in law to alienate this provision, whether what he actually did in joining in the deed to Messrs. Fontaine and Smith and in his cessions certain creditors, amount to a legal transference of his rights to any of those parties.

We now order those points to be argued before the Full Bench at the beginning of next term. In the meantime the attaching party, Mr. Mercier will give formal notice of the suit to Messrs. Fontaine and Smith, and the person to whom Mr. Buttié granted cessions or conveyances of his rights in said provision, that they may appear, and be heard for their interest if so advised. All questions of costs reserved.

The Case of Laurent versus Buttié will abide the decision of the present case.

MAURITIUS BAIL COURT.

—

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE,—JURISDICTION OF DISTRICT COURTS,—CLAIM WITH INTERESTS EXCEEDING £50—ABANDONMENT OF INTERESTS,—AMENDMENT.

—

Looking to the large powers of amendment allowed to the District Magistrate, to the fact that the real question at issue was the principal sum of £ 40, to which that of the interest was subsidiary, that there was nothing on the face of the plaint to show that the sum exceeded the limit of the Magistrate's jurisdiction, and that immediately upon the attention of the Plaintiff being drawn to the result of such a calculation and before the hearing he abandoned the interests entirely, I do not think the Magistrate has exceeded his powers in allowing the abandonment and proceeding to adjudicate upon the substantive question at issue.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—JURISDICTION DES COURTS DE DISTRICT,—RÉCLAMATION AVEC INTÉRÊTS EXCÉDENT £50--ABANDON DES INTÉRÊTS,—AMENDEMENT.

—

Considérant les grands pouvoirs d'amendement qui sont accordés aux Magistrats de District, considérant aussi ce fait que le débat reposait sur une somme principale de £ 40, et que la qnestion d'intérêts n'était que secondaire ; qu'il ne ressortait pas de la plainte que la somme réclamée était hors de la jurisdiction du Magistrat, et considérant qu'aussitôt que l'attention du Plaignant ait été altirée sur le résultat de ce calcul il a abandonné les intérêts avant que la cause ait été entendue, je ne crois pas que le Magistrat ait excédé ses pouvoirs en accordant l'abandon des intérêts et en donnant jugement sur la réclamation de £ 40.

—

Before :

His Honor Mr. JUSTICE GORRIE.

—

TOURNOIS,—Appellant.

versus.

DÉSIRÉ,—Defendant.

—

EUG. DESMARAIS,—Of Counsel for Appellant.
COMARMOND,—Attorney for the same.

L. V. DELAFAYE,—Of Counsel for Respondant
P. F. LASTELLE,—Attorney for the same.

—

26th July 1872.

This is an appeal from a judgement of the District Magistrate of Port Louis, on the ground that he had no jurisdiction to try the cause.

The plaint is for the recovery of a debt of two hundred dollars constituted by a writing dated 20th February 1861, together with interest thereon at 9 per cent from 20th February 1867.

After the case was called in Court, and

certain amendments of the plaint had been allowed by the Magistrate on the motion of the plaintiff, the Counsel for the Defendant objected to the jurisdiction of the Court on the ground that the claim with interest exceeded the sum of £ 50 which is the limit of the Magistrates Jurisdiction.

The Counsel for the plaintiff thereupon abandoned the interest, and moved for judgment for the sum of $ 200.00 only. This was allowed by the Magistrate and Judgment was ultimately given for the Plaintiff.

We have not adopted in this Colony the later amendments and rules of the County Court practice at home which require all abandonments of claims in excess of the Jurisdiction to be made in the particulars to be furnished by the Plaintiff and served with the Summons. The Article in our Ordinance 34 of 1852 which treats of an abandonment of excess viz: Art. 27 is the same as § 63 of the 9 and 10 Vict. C. 95 so that so far as regards the analogy of English practice it would be necessary to confine ourselves to the earlier cases.

We have however a provision (Article 8) which was not contained in the statute just cited which allows parties, by consent to give jurisdiction to the Magistrate in claims above £ 50, and in ordinary questions involving the plea of want of jurisdiction the principle of the English cases which deal solely with the provisions of 9 and 10 Vic. C. 95 might fall to be notified by a consideration of this article.

The general principle appears to be that the Magistrate ought not to entertain a cause in which the plaint upon its face prays for Judgment in a greater sum than the law has fixed for the jurisdiction of the Magistrate.

In this case the plaint was for a principal sum of an amount less than the £ 50 which forms the limit of the Magistrate's jurisdiction, and for interest for five years, the sum not being calculated, but merely stated as something dependent on the Judgment to be formed on the substantive part of the plaint for the principal sum.

The five years arrears of interest at 9 per cent being added to the original claim of £ 40 brings up the sum in whole to £ 54, and the contention of the Appellant is that such being the result of the calculation the action was *ab initio* null and that the Magistrate had no authority to entertain the cause even to the extent of allowing the plaintiff to abandon any excess of interest above the sum of £ 50.

I think that the English cases upon the statute of 9 and 10 Vic. C. 95 did not go this length but certainly allowed an abandonment of excess before Judgment when upon the result of an accounting the sum due was brought out as exceeding the £ 20 which was then the County Court limit.

Here the plaintiff, before hearing, not only abandoned the sum of £ 4 which was the excess above the limit of the Magistrates jurisdiction, but he abandoned the interest altogether and this abandonment makes it impossible for him to claim it hereafter.

The Appellant accordingly comes to us in this position that he objects to a procedure by which his creditor has waived all claim for interest for five years. He does not offer to deposit the sum due to abide the issue of an action in the Supreme Court, but takes his stand upon the technical objection he has raised.

On the question of jurisdiction I certainly think the Magistrate and the Magistrate's Clerks who issue the Summons ought to be very careful to keep within the limits of the powers conferred by the Ordinance, but in the case before us looking to the large powers of amendment allowed to the District Magistrate to the fact that the real question at issue was the principal sum of £ 40 to which that of the interest was subsediary that there was nothing on the face of the plaint to show that the sum exceeded the limit of the Magistrate's jurisdiction, and that immediately upon the attention of the plaintiff being drawn to the result of such a calculation, and before the hearing, he abandoned the interest entirely, I do not think the Magistrate has exceeded his powers in allowing this abandonment and proceeding to adjudicate upon the substantive qnestion at issue viz: the right of the plaintiff to recover the principal sum of £ 40 sued for. I therefore dismiss the appeal with costs.

SUPREME COURT.

—

ILLEGAL DETENTION OF LAND. DAMAGES.

—

Deeds of sale. Two parties have bought the same piece of ground from two different vendors, Galdemar and Ducray. Vendors to be made aware of the present Judgment.

—

DÉTENTION ILLÉGALE DE TERRE. DOMMAGES.

—

Actes de vente. Deux personnes ont acheté le même terrain de deux vendeurs différents, Galdemar et Ducray. Il faut donner aux vendeurs connaissance du présent jugement.

—

MARION,—Plaintiff.

versus

TYACK,—Defendant.

—

Before:

His Honor Sir C. FARQUHAR SHAND KNT.,
Chief Judge, and
His Honor M. Justice N. G. BESTEL,
First Puisne Judge.

—

T. L. JENKINS,—Of Counsel for Plaintiff,
F. SIMONET,—Plaintiff's Attorney.

L. ROUILLARD.—Of Counsel for Defendant,
J. PIGNÉGUY,—Defendant's Attorney.

—

26th July 1872.

In this case the plaintiff alleging that he was the lawful owner of a piece of ground of one acre in extent with buildings and appurtenances thereon, situate at "Napanon" in the District of Savanne, sought judgment against the defendant as illegally detaining the said land and asked that it should be awarded to him in property with the sum of £500 sterling as damages for the alleged destruction of certain buildings on the land, with costs of suit.

The defence was that the land in question was the property of the defendant, not of the Plaintiff.

The facts and titles on which the Plaintiff supported his case were the following: He alleged that he bought the piece of ground in question, bounded as setforth in his declaration from one Clement Galdemar, by an act under private signatures, duly registered and transcribed dated 24th October 1870, for the price of $ 500 paid Cash: that the said Galdemar bought the land from one Alfred Gustave Ducray by deed under private signatures dated the 18th July 1870, duly registered and transcribed; that a condition of redemption (remeré) existing in said deed had been formally renounced by the said Ducray; that the said Vendor Ducray was the owner of the land, having bought it from his father Marie Jean Ducray, by an act under private signatures, dated 1st March 1866, duly registered and deposited among the Minutes of Notary Macquet, on 31st March of same year.

It appeared that the said acre of ground was part of 20 acres bought by Ducray Senior from one Dubois and his wife, on 18th January 1824. The acre bought by Ducray Junior from his father, had been surveyed by Pastourel on 14th January 1862, in presence of both vendor and purchaser.

The plaintiff farther averred that the defendant, having purchased some land in the neighbourhood, had taken advantage of that occasion, unlawfully and wrongfully to seize the property of the plaintiff, tho' well konwing that it did not belong to him, the defendant had demolished the buildings thereon causing him the serious loss above referred to.

The defendant on the other hand showed in evidence, that he had purchased on the 24th June 1869, from the said Marie Jean Ducray and Miss Mary Tamby, as conjoint liferenters, and Miss Virginie Ducray, Edouard Fouque and his wife duly authorized, Léonce Ducray, and the said Alfred Ducray, the two last parties as co-owners of the bare property with the said Miss Tamby and Mrs Fouque, the whole of the ground of 20 acres originally bought by Ducray the father, in the year 1824, from Dubois and his wife.

The description of the subjects in the deed of sale was as follows:

"La propriété, possession et jouissance d'une "portion de terrain, habitation de la contenance de vingt arpens environ, située en "cette Ile au quartier de la Savanne, sans "garantie de cette contenance, la différence en "plus où en moins, fut-elle de plus d'un

" vingtième," devant tourner au profit où au " préjudice de l'acquereur, sans aucune recla- " mation ou indemnité de part ni d'autre."

" La dite portion de terrain est bornée à " l'Est par le grand Chemin de Souillac, au " Sud par le Sieur Joseph Hérisson, ou autres " personnes à ses droits, au Nord par Monsieur " Lacourtaudière ou autres à ses droits et à " l'Ouest par les sinuosités de la Rivière des " Anguilles."

" Sont compris dans la présente vente les " maisons bâtiments et dépendances existant " sur la dite portion de terrain ainsi que les " bois, les plantations de cannes et autres " plantations qui s'y trouvent sans aucune " exception ni réserve."

" Tel et en l'état que le tout se poursuit, " étend et comporte et dont il n'est pas fait " d'autre désignation, l'acquéreur déclarant " bien connaître les lieux et en être satisfait."

" La livraison du bois et des plantations, " aura lieu immédiatement et la livraison de la " maison, des bâtiments et du jardin potager " aura lieu le trente Août prochain."

" Pour Monsieur Tyack jouir, faire et dis- " poser du tout comme de chose lui apparte- " nant, en toute propriété, au moyen des " présentes."

This deed narrated a sale for the price of $ 300, dated 27th March 1867, made by the said Marie Jean Gustave Ducray to the said Alfred Ducray, Virginie Ducray, Mrs. Fouque and Léonce Ducray of the bare property of the said subjects reserving the life rent of himself and that of Miss Mary Tamby who lived with him. In this deed nothing was said of the sale of the one acre to Alfred Ducray in 1864, and the description of the subjects was admitted to be that of the 20 acres bought, as we have seen from Dubois and wife in 1824.

N. P. In this position of matters the defendant contended that even, assuming the truth of the whole of the plaintiffs statement, the latter could not succeed in his action as he, the defendant, had a prior onerous conveyance flowing from the common vendor to both sides viz: Alfred Ducray—The defendant bought as we have seen in 1869, while the sale to the Plaintiff's immediate vendor, Galdemar, was not till the year following viz: in 1870. To this the plaintiff answered that the acre in question could not be held to be included in the sale to the defendant and others, in 1869, that he would shew by parole evidence that the facts were inconsistent with the supposition that it was so included; that Alfred Ducray in that deed merely intended to convey his undivided share of what remained of the 20 acres, after deduction of the one acre to which he held a separate and distinct title, as we have already seen from his father in 1864.

Whatever the decision of the Court may ultimately be as between the present parties in all probability, the result will bear hard on one or other of them. Both have apparently purchased the plot of ground in question, and paid for it. But they did not both buy directly and immediately from Alfred Ducray—The defendant did so, but the plaintiff as we have seen bought from Clément Galdemar, who in his turn had bought from Alfred Ducray.

We think it will be proper before giving judgment, that those two parties viz: Clément Galdemar and Alfred Ducray be made aware of the present suit, that if so advised, they may make such appearance for their interests, as they may deem proper. We therefore under reservation of all rights of parties, order the plaintiff to give formal notice of these proceedings to the above named persons.

SUPREME COURT.

Seizure of the rent of a land by Cazalens. Erasure of the same at the mortgage office, the title in vertue of which it had been taken being null. New seizure of the same rent by the Heirs Boët. Application for the transcription of the same at the mortgage office, opposition against the transcription.

Cazalens, it appears, had obtained against Buttié the father, a judgment for a certain debt, subsequently shewn by certain interested parties or creditors of Buttié to have been a fictitious one, and the judgment given in his favor, is therefore null and void. The seizure made in vertue of such judgment was rotten at its very root and must also be set aside. The new seizure of the Heirs Boët to be transcribed. The opposition of Cazalens is set aside.

Saisie de loyers d'un terrain par Cazalens. Radiation de cette saisie au bureau des Hypothèques, le titre en vertu duquel elle avait été faite, devenant nul. Nouvelle saisie des mêmes loyers par les Héritiers Boët. Application pour la transcription de cette nouvelle saisie. Opposition contre la transcription.

Il paraît que Cazalens avait obtenu contre

Buttié père, un jugement pour une dette, qui fut prouvée, par les parties intéressées ou par les créanciers de Buttié, ne pas exister, et le jugement, donné en sa faveur, est par conséquent nul. La saisie faite en vertu de ce jugement est mauvaise et doit tomber. La nouvelle saisie faite par les Héritiers Boët doit être transcrite ; l'opposition de Cazalens à la transcription doit être rejetée.

—

HEIRS BOET,—Plaintiffs.

versus

CAZALENS & ors.—Defendants.

—

Before:

His Honor Mr. Justice Nicholas Gustave Bestel, First Puisne Judge, and
His Honor John Gorrie, Second Puisne Judge

—

L. Rouillard,—Of Counsel for Plantiff.
L. Wohrnitz,—Plaintiff's Attorney.

E Pellereau,—Of Counsel for Defendant,
E. Laurent,—Defendant's Attorney.

—

26th July 1872.

An application was made at Chambers for a Summons against the defendants to shew cause why the seizure made at the request of Cazalens and other defendants should not be erased from the Registers of the Conservator of Mortgages of this island.

On the return of the Summons on the 25th March ultimo default was recorded against Fonrose Cazalens and in presence of the objections of Chastellier for Buttié, the application was referred to the Court where it was argued on the 2nd May last.

On the calling of the Case for trial, Chastellier informed the Court that he intended to take no part in the argument about to take place between Rouillard for the heirs Boëte and Pellereau for several creditors of Buttié. Rouillard for the heirs Boëte then opened as follows.

One Fonrose Cazalens a creditor of Buttié obtained judgment against the latter and in virtue of such judgment caused certain piece of land belonging to Buttié and rented by Donald Rochecouste to be seized—This judgment was subsequently set aside by this Court for the reasons therein set forth.

On the other hand the heirs Boëte in virtue of a judgment against Buttié caused the same piece of land and the rent thereof to be seized. On application to the Conservator of Mortgages for transcription of this second seizure, that public officer refused the transcription prayed for on the ground that an opposition to the erasure of the previous seizure of Fonrose Cazalens had been lodged in his hands at the request of certain judgment creditors of the Community of goods and property which had existed between Buttié the father and his deceased wife.

The erasure prayed for added Rouillard was a matter of course. The title in support of Cazalens seizure having been annulled by the Court, it necessarily followed that the proceedings had upon that title of which the seizure was a part, are null and void. If so that seizure cannot be an obstacle in the way of the transcription of the heirs Boëte's seizure and subrogation into the proceedings of levy radically null could not either be demanded nor allowed (Journal du Palais 1808-1809 page 584-586.)

The only safe legal mode to proceed under such circumstances for the heirs Boëte was the one adopted by them (viz) to proceed to a new seizure and apply as they have done for the erazure of Cazalens' vitiated seizure so as to allow of the transcription of a new valid seizure.

The validity of the second seizure by Plaintiffs was however questioned by Pellereau on the allegations of inherent vice in the title of the heirs Boëte.

The judgment upon which the seizure was made, it was said, is a common judgment by default which had lapsed for want of execution within six months, whereas the seizure the erasure of which is prayed for had originally been made upon a valid title and must be sustained. Subrogation might therefore have been lawfully and rightly asked for and ordered.

JUDGMENT.

In the case of Leguen and others against Buttié the father in which judgment has just been delivered, the Court has had the opportunity of determining the true character of the judgment obtained by Boëte against Buttié. We have holden for the reasons set forth in our judgment that that judgment was not a common judgment by default, but a judgment by default *faute de conclure* and as such not susceptible of lapsing for non execution, within six months, but amounted in law and practice to a contradictory judgment and as such executory for thirty years.

Hence the inference that the proceedings of levy of the Heirs Boëte resting upon a valid title must a priori be holden to be valid, and we would have at once ordered its transcription by the conservator of mortgages, had we not previously to decide on the worth of the opposition lying in the conservator's way, and in our own.—

Cazalens, it appears, had obtained against Buttié the father judgment for a certain debt, subsequently shewn by certain interested parties or creditors of Buttié to have been a fictitious one, and judgment given in his favor was therefore declared null and void by the Court.

But before the decree of the nullity of the judgment obtained by Cazalens, the latter in execution of his judgment, the validity of which has not yet been challenged, had caused a seizure to be made of the same plot of ground subsequently seized by the heirs Boëte either before or after the nullity of Cazalen's original judgment had been decreed by the Court.

The only title against Buttié upon which the seizure of Cazalens had been made having been set aside, though at a subsequent, period it is self evident that the seizure at Cazalens' request was groundless and altogether unwarranted and unwarrantable having been made in law and in fact without right or title on Cazalens' part.

The seizure was rotten at its very root. This being the case a subrogation into Cazalens proceedings was a legal impossibility Dalloz Rep. Vol: Vente Publique d'Immeubles page 767, No. 1078-1079, Chauveau sur Carré, Vol: 5 2me Partie Quest. 2416—A new seizure was therefore required in order that the ejectment of Buttié might be safely effected.

A new seizure was accordingly made by the heirs Boëte, and for the reasons above given we are of opinion that it ought to be transcribed on the Registers of the Conservator of mortgages.

We shall and do therefore set aside the opposition lying in the Conservators hands to the erasure of Cazalens' seizure, and order that it be forthwith erazed from the Conservator's Registers, and that the seizure at the request of the Plaintiffs the heirs Boëte be transcribed and that the proceedings in ejectment be proceeded without any further loss of time.

Costs against the Defendants.

SUPREME COURT.

—

FOREIGN DEBT.—PRESCRIPTION,—DOMICILE.

—

In suits for recovery of foreign debts, the prescription of the place where the debt is sued for, LEX FORI, *is applied. Circumstances in which a party was held to have lost his domicile of origine (India) and acquired a domicile by residence in Mauritius.*

—

DETTE CONTRACTÉE A L'ÉTRANGER—PRESCRIPTION,—DOMICILE.

—

Dans les actions intentées pour le recouvrement de dettes contractées à l'étranger, on applique le prescription du lieu où l'action est portée. LEX FORI. *Circonstances dans lesquelles une personne a perdu son domicile d'origine (l Inde) pour en acquérir un autre en venant habiter Maurice.*

—

GOOLAM HOSSEN MAHOMED,—
Plaintiff.

versus

MAHOMED ASSENJEE,—Defendant.

—

Before:

His Honor Sir CH. FARQUHAR SHAND KNT.
Chief Judge, and
His Honor Mr. Justice N. G. BESTEL.
First Puisne Judge.

—

W. NEWTON,— Of Counsel for Plaintiff.
M. SAUZIER,—Plaintiff's Attorney.

E. PELLEREAU,—Of Counsel for Defendant.
E. SAUZIER,—Defendant's Attorney.

—

26th July 1872.

On the 5th of August 1868 while both parties were resident at Bombay the defendant granted the following obligation to the Plaintiff.

"*Bombay, 5th August* 1868."

"I Mahomed Usunje promise to pay to "Goolam Hossen Mahomed or order, on "demand either at Bombay or at any other "place where I may be domiciled, th sum of "Rupees eight thousand and five hundred "only for value received."

"(Signed) MOHOMED USUNJE."

R. 8,500.

The next day the defendant left India for Mauritius and being now sued for payment he pleads prescription and specially the three years limitation which he alleges prevails in India in cases of this description. He has been examined on oath with the view of ascertaining where his legal domicile is. He has deponed that he has paid the money, but admits that he has no evidence to show for this, and it has been agreed on both sides that his examination shall be held conclusive as to whether he still retains his domicile of origin in India, or has acquired, and at present possesses, a fresh domicile in Mauritius. The arguments of parties have been mainly directed to the question of what law of prescription shall be held to apply to the case, whether the law of India where the obligation was contracted and where the defendant contends that he is still domiciled or the law of Mauritius where the obligation is sought to be enforced, and where the Plaintiff maintains the defendant has acquired a domicile.

The question of what prescription is to apply when a contract or obligation is sought to be enforced out, of the country where it was made, is a very important, and interesting one. It has been much discussed by writers of highest eminence and of different countries, and been frequently the subject of decisions by the Courts of law in Europe, and America. It is impossible to affirm that the question can now be held as finally settled. All the civilized world over, but the whole weight of authority British and American is so completely in favor of the rule that the *lex fori* should prevail, that we consider ourselves quite precluded from examining the question at length. It was urged by the defendant, that we are here to be guided rather by the opinions of French writers, and by the decisions of the Courts of that Country, than by the English Authorities; but we find ourselves in a question like this, not, be it observed, of Municipal, of French or Colonial, but of international law, bound by what has been decided by the judges of the Privy Council to whom we are subordinate. That Supreme Tribunal has declared, "that it has become "almost an axiom in jurisprudence, that a "law of prescription or law of limitation "which is meant by that denomination, "is a law relating to procedure, having "reference only to the *lex fori*." *Her highness Ruckmaboye* v. *Sulloobhoy Mottichund*, December 1851 and November 1852. Moore's P. C. Cases VIII. 35. Whether this doctrine may not be held to be too broadly, and strongly stated when the French and German authorities are looked at, may well be doubted, see Foelix Droit International, Liv: 2: t. 2. 1, but we are bound to follow the ruling of our own Highest Court of appeal which we believe is entirely in accordance with the now accepted doctrine of England and America,—we are therefore of opinion that the Prescription of our own law i.e. of the Civil Code, must *prima-facie* prevail in this case. We say *prima-facie* for if the defendant should be in a position to shew that the law of the place where the contract was entered into (Bombay) absolutely annuls the contract and not merely cuts off the remedy and that by the lapse of a shorter period than the term of prescription adopted by the Civil Code, an argument might be open to him as was noticed in the course of the discussion at the bar on the grounds alluded to by Story in § 852 of his work on the conflict of laws—On such a question, and in entire ignorance of the Indian law of prescription, we of course at present give no opinion.

Should the case be farther argued before us, it may be, that the point of the defendant's domicile may have a bearing on the decision of the case. We shall therefore give our opinion upon that matter.

N. P. The domicile of origin of the defendant, was in India, and that domicile, according to the recognised priuciples of laws, he would retain till he acquired another. On the evidence submitted to us, we think that he has lost his domicile of birth and acquired a domicile in Mauritius. It appears that he is a man of 40 or 45 years of age, that he has been 10 or 15 years in this Colony, where he established himself in trade and had his "principal "seat of business—son principal établisse-"ment." He married in Mauritius 8 years ago, in the regular way before the Officer of the *Etat Civil* and lives with his wife and children, and has his property, whatever it may be, is in this Colony.

It is true that he left a former wife in India for he tells us: "We have wives wherever we go" but he contributes nothing to her support; she is maintained by his son a grown up lad who is with his father in Mauritius, he farther tells us that he has paid repeated visits in the way of trade to India and he says that he considers his home to be there and that he intends retiring to India, when he has done

trading, to settle there. We think on this evidence given it must be observed Post *litem motam* and when the defendant finds it expedient to say what he can against a domicile in this Country, that the defendant's domicile must be held to be in Mauritius according to the general legal principles applicable to questions of this nature and the rules of the Code Civil Art: 102 and seq: With these points now decided by the Court, the parties will consider as to the farther course of the Case—All questions of Costs meanwhile reserved.

SUPREME COURT.

—

Crime commis en pays étranger par un sujet Britannique. Enquête préliminaire faite par un Consul Britannique dans un pays étranger. Ses pouvoirs d'envoyer devant les assises. Jugement à Maurice. Les Documents de l'enquête peuvent être produits en évidence, mais il faut qu'ils soient tous produits.

Crime in foreign countries by a British subject. Preliminary enquiry by a British Consul in a foreign country. His powers of commitment. Trial in Mauritius. Documents of the Enquiry to be evidence but in their entirety.

—

Un Consul Britannique hors des possessions de Sa Majesté a les mêmes pouvoirs qu'un Juge d'Instruction. L'ordre en Conseil de 1869, § 23 *donne jurisdiction à la Cour Suprême de Maurice de juger les affaires dans lesquelles le Consul Britannique a fait une enquête préliminaire. Mais les papiers produits en évidence comme étant l'enquête préliminaire faite devant un Consul doivent être produits tous et non pas retranchés en partie au gré de la Couronne ou du prisonnier. Toute la question est résolue par le* § 2 *des actes* 6 & 7 *de Victoria, Chap.* 94.

A British Consul out of Her Majesty's dominions has the same powers as a Committing Magistrate. Order in Council of 1869, § 23 *gives jurisdiction to the Supreme Court of Mauritius to try cases in which a British Consul has made a preliminary inquiry. But the papers purporting to be the preliminary proceedings before a Consul must be put in evidence in all their entirety and not cut to pieces at the request of either parties. The whole of the question is settled by* § 2 *of the acts* 6 & 7 *Victoria Chap.* 94.

—

THE QUEEN

versus

MURATORIO.

—

Before:

His Honor Sir CH FARQUHAR SHAND KNT., Chief Justice.

—

LIONEL COX,—Acting Substitute Procureur & Advocate General for the Crown.

W. NEWTON, E. ANDRÉ, } Of Counsels for the prisoner.

—

28th August 1872.

In this case the charge against the prisoners is that on the 22nd of April last, at Tamatave, in the Island of Madagascar, they did criminally, wilfully and with intent to defraud, during the night and by means of breaking, abstract, steal, take and carry away the sum of $ 1000, against the peace, etc.

The second prisoner, on the motion of the Crown, has been acquitted. that he may be called as a witness against the other prisoner.

The Crown has now moved that certain documents, purporting to be proceedings in the case taken before the British Consul in Madagascar, should be put in evidence, these proceedings appear to be under the hand and seal of the Consul. The Crown moves to be allowed to withdraw a portion of the contents of those papers, viz: the statements purporting to have been made before the Consul by a witness named Marie, but insists on its right to put in evidence, the rest of the papers, alleging that there is a confession therein contained, made by the prisoner Muratorio.

For the defence it has been strenuously contended, that such production is inadmissible, on the ground that the British Consul in a foreign country has not under the order in Council of 4th February 1869, the position and powers of a Committing Magistrate, but that by § 23 of that order by which proceedings of the nature of the present are regulated, the Magistrate of the District Court of Port Louis, is in law the Committing Magistrate, that the documents in question have accordingly none of the numerous sanctions required by law to warrant their admission as evidence, and there

is no possibility of calling the Consul as a witness, if necessary, which is allowed in all cases if the prisoner is in a situation to challenge the regularity or correctness of what is said to have been done, before the Committing Magistrate.

Under the section of the order, this Supreme Court, must proceed to hear and determine the case, in the same manner as if the crime had been committed with in the Colony of Mauritius.

Counsel referred to 11 and 12 Victoria C. 19. Hales Pleas of the Crown p. 284. Phillipps on evidence 1 p. 119. Rex Vs. Foster, *Carr*: and Payne (1835) p. 114. It was further submitted that the statute of 18 and 19 Vic. C. 42 cannot help the Crown as it only authorizes British diplomatic and consular agents, to administer oaths and perform notarial acts.

Here it was added, we have not even the original documents, but only an alleged copy of them, to admit such a writing in evidence would be contrary to all legal principle and practice.

The Crown *contra*, relying on the terms of § 23 of the order in Council and the act therein referred to 6 and 7 Victoria C. 94.

THE COURT.

The question, now raised, is one of novelty and of some difficulty, I have had an opportunity of conferring with my brethren on the Bench, and the conclusion we have arrived at, is the following:

By the order in Council of 1869, this Supreme Court of Mauritius has jurisdiction expressly conferred upon it to try and determine all cases of the nature of the one now before us.

Whenever a jurisdiction is conferred, it is a fundamental principle of all jurisprudence, that *omnia conceduntur sinequibus explicari nequit*. But in the class of cases now before us, the machinery for enabling us to exercise the jurisdiction is laid down in § 23 of the order and the proceedings which purport to shew, that the British Consul in Madagascar took cognizance of the offence to use the words of the article now objected to, as evidence, on the grounds above stated. But in what way, can this Court know what the proceedure for laying the case before it has been, except by looking at the papers forwarded by the Consul at Madagascar to whom the law has expressly entrusted the conduct of the preliminary stages of such enquiries—It is argued that the proof of the authenticity and genuineness of those papers, is defective, but by § 2 of the acts 6 and 7 Vict: C. 94, it is declared, that every act, matter and thing, which may at any time be done, in pursuance of any such power, or jurisdiction of Her Majesty, in any country or place out of Her Majesty's Dominions shall in all Courts, Ecclesiastical and Temporal and elsewhere, within Her Majesty's dominions, be and be deemed and adjudged to be, in all cases, and to all intents and purposes whatsoever, as valid and effectual, as though the same had been done according to the local law, then in force, within such country or place.

It appear to us therefore that the papers purporting to be the preliminary proceedings before the Consul in Madagascar and to bear his hand and seal, must be admitted by the Court. But while this is our view of the case, we think that they ought to be admitted in all their entirety, we cannot cut them into pieces at the request of eitheir of the parties, the Crown or the prisoner, should they be laid before the Jury there will be of course, ample oppurtunity for the Crown and Counsel on both sides offering such comments upon them, as they may deem fit & proper.

SUPREME COURT.

DIVORCE POUR SEVICES, INJURES GRAVES,—INSULTES,—ABANDON,—L'ADULTÈRE SIMPLE DANS DES CIRCONSTANCES SPÉCIALES ÉQUIVAUT AUX SÉVICES ET INJURES GRAVES.

DIVORCE FOR SŒVITIÆ, INJURES GRAVES,—ABUSIVE LANGUAGE,—ABANDONMENT,—SIMPLE ADULTERY UNDER SPECIAL CIRCUMSTANCES AMOUNT TO SŒVITIÆ AND INJURES GRAVES.

Le défendeur ne peut pas échapper aux conséquences de sa conduite qui a été, d'après ce que les témoins ont prouvé, mauvaise et honteuse, parce que sa concubine n'a pas vécu sous le toit conjugal: afficher ouvertement et publiquement son immoralité aux yeux de sa femme et de la communauté dans laquelle on vit est l'outrage le plus grand qu'un homme puisse faire à sa femme.

The defendant cannot escape all the consequence of his conduct, which the evidence

shows to have been very bad and disgraceful, because his concubine has not been kept in the conjugal residence ; the act of publicly and openly flaunting his immorality in the eyes of his wife and of the whole public community in which he lives is one of the greatest outrages a man can inflict upon a woman.

—

EDMOND THE WIFE,—Plaintiff.

versus

EDMOND THE HUSBAND,—Defendant.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT.,
Chef Judge and
The Honorable MR. JUSTICE BESTEL,
First Puisne Judge.

—

G. GUIBERT,—Of Counsel for Plaintiff.
F. ROBERT,—Attorney for the same.

A THIBAUD,—Of Counsel for Defendant.
J. MERCIER,—Attorney for the same.

3rd September 1872.

This was an application by a wife for judgment of divorce *à vinculo matrimonii*, on the ground of *sevices et injures graves*.

The plaintiff charged the defendant with having soon after their marriage, which was solemnized on the 25th January 1862—begun and continued to apply to her the most abusive epithets, also with absenting himself unnecessarily from home, entering at an advanced hour of the night, and with failing to supply her and her two children with the necessaries of life which had to be provided by the plaintiff's father. The plaintiff further alleged that the defendant lived in open adultery with the wife of another man, that on the 25th July 1871 during the necessary absence of the plaintiff, on account of her health from the conjugal roof, the defendant introduced his paramour into her bed-room, and passed the night with her there,—further that on the 17th December 1871 the defendant went off by the Mail Steamer to the Seychelles Islands without giving any notice to the plaintiff, that he was accompanied by the said female with whom he cohabited during his absence a period of several weeks, that the plaintiff was then in bad health, and was completely abandonned by the defendant, that the defendant returned to Mauritius by the Mail Steamer of 20th January last accompanied by his said paramour whose name appeared on the list of passengers as Mrs. Jean Leonce Edmond ; that since their return to this Island the defendant and the said woman have continued to live in adultery.

After a careful consideration of the evidence which has been laid before us, we are satisfied that the plaintiff has established the following facts viz : that the defendant treated her with great neglect even when she was seriously unwell, occasionally kept late hours, and sometimes, but not habitually, addressed her in coarse and abusive language ; that he contributed but little to the support of his wife and family, that he cohabited with another woman, when on one occasion in the absence of his wife, he introduced her into the conjugal domicile and passed the night with her there, that he told his father-in-law that he was living in adultery with the said woman for eighteen months; that he went with the same paramour to the Seychelles Islands, cohabited with her there as man and wife for several weeks and returned in her company to Mauritius. The conduct of the plaintiff was shewn to be very good.

In the argument upon the evidence, the defendant contended that the proof was not sufficient to support a judgment of divorce saying this case must be dealt with as if the new Ordinance No. 14 of 1872, 25th June 1872 to amend the law relating to divorce had not been passed.

Admitting the defendant contended that simple adultery on the part of the husband equally entitles the wife under the new law, to a divorce, as the same Act on the part of the wife entitles the husband to the same relief under the old law simple adultery on the part of the husband was not enough. The Civil Code Art. 230 requires that the husband should keep a concubine in the house occupied by the spouses : " La femme " pourra demander le divorce pour cause " d'adultère de son mari, lorsqu'il aura tenu " sa concubine dans la maison commune," that the facts spoken to by the witnesses even if believed by the Court, did not come up to what the law required, the Acts of adultery alleged being merely isolated and casual, the defendant never kept a woman in the common dwelling house, that adultery being by itself in certain circumstances a substantive ground of divorce under the said Article of the Civil Code, could not be dealt with as an Act of " excès, sevices, and injures graves," under the following Article of the Code viz : 231 either by itself or jointed to other alleged acts of excess or (sœvitiœ) or grivous injuries.

To this the plaintiff replied that it was a matter of indifference to her under which law the present case might be held to fall, if under the later law, an Act of simple adultery on the part of the defendant was sufficient to support her demand for divorce *à vinculo*, if under the older law, the facts established, taken as a whole, amounted to that degree of *excès, sevices et injures graves* which warranted a Court of law in granting the demand of the injured party.

The new law of divorce come into force on 25th June last, long after the facts on which the present case is founded, and after the judicial proceedings now before us were in Court. The Ordinance says nothing about cases actually pending in the Court but it would be contrary to all legal principle to give it a retrospective effect, so far especially as the substance of the law itself may be changed by its enactments, and apply its sometimes to a case which had occured and in which the proceedure had advanced so far under the older law. Admittedly if we were to deal with the case under the new law, the plaintiff must have judgment in her favor.

But the case we think plainly falls to be disposed of under the old law.

Let us now consider the case as one to be governed by this older law, *i. e.*, the law of the Civil Code. It is said by the defendant and we think, properly said, that under the law contained in Article 230 of the Civil Code, the plaintiff has not made out a case for divorce. We agree for the plaintiff in this contention.

The adultery by the husband was not of that kind which entitles the injured wife to a dissolution of the marriage.

There was no concubine kept in the conjugal residence. Under that Article, therefore, we consider that the plaintiff has no remedy. But shall the defendant therefore escape all the consequence of his conduct which the evidence shows to have been very bad and disgraceful. Is there no relief to a wife, whose feelings have been outraged by the greatest injury which a husband can inflict upon a woman of virtue and spirit because he has not brought himself technically within the rule of Article 230 of the Code. A husband may have kept his mistress not within the walls of his own house, but it may be in the next house of the street, in which he and his wife live, or on the opposite side of the way, and openly and publicly flaunt his immorality in the eyes of his wife and of the whole public community in which he lives. Is not this one of the grossest outrages a man can inflict upon a woman? Should such conduct not to be held to fall within the category of *injures graves* contemplated by Article 231 C. C. assuredly we think it ought. The character of those gross outrages contemplated by the law is well described by Demolombe in these words p: 477 Du mariage.

"Les injures graves résultent de *paroles* "*d'écrits* où de *faits outrageants*, par les- "quelles l'un des époux attente à l'honneur "et à la considération de l'autre, et témoigne "pour lui, des sentiments de haine d'aversion "où de mépris."

Referring to the facts within the allegations of the plaintiff, and which we have found to be established by the evidence, as already stated, we have no hesitation in finding that the plaintiff has proved her case for a divorce. We therefore hereby pronounce judgment of divorce *à vinculo matrimonii* in favor of the plaintiffs with costs.

SUPREME COURT.

FAILLITE,—SAISIE REVENDICATION,— APPLICATION DE L'ARTICLE 2102 DU CODE CIVIL AUX AFFAIRES COMMERCIALES,— UNE ORDONNANCE QUI A ÉTÉ ABROGÉE EST REMISE EN VIGEUR PAR L'ABROGRATION DE L'ORDONNANCE QUI A ABROGÉ LA PREMIÈRE,—QUESTION NON DÉCIDÉE,— EVIDENCE,—LA POSSESSION DE MARCHANDISES PAR LE SYNDIX OFFICIEL ET NON PAR LE VENDEUR NE CONSTITUE PAS LA PRIVILÈGE DE VENDEUR.

BANKRUPTCY, — SAISIE REVENDICATION,— ARTICLE 2102 OF THE CIVIL CODE TO BE APPLIED IN COMMERCIAL MATTERS,—REVIVAL OF A REPEALED ORDINANCE BY THE REPEAL OF THE REPEALING ORDINANCE,— QUESTION NOT DECIDED, — EVIDENCE,— THE POSSESSION OF GOODS IN THE HANDS OF THE OFFICIAL ASSIGNEE, AND NOT IN THAT OF THE BUYER, CREATES NO PRIVILEGE OF VENDOR.

Même en appliquant l'Article 2102 *du Code Civil aux affaires Commerciales, le privilège de vendeur est perdu par le fait que les marchandises vendues sont entre les mains du Syndic Officiel.*

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master,
J. A. ROBERTSON, Esq., Substitute Master,

O. D'EMMEREZ DE CHARMOY, Esq, Registrar.
L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
G. A. RITTER, Esq., Registrar.
JAMES BROWN, Marshall.
J. BOUCHET, Queen's Proctor.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT

J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E,	1828	Jenkins, T. L.	1865	Ollier, R.	1870
Campbell, C. M.	1841	Florent, E	1865	Poulin, F.	1870
Bazire, E	1858	Desmarais, E.	1866	Forget, A.	1870
Leclézio, E J	1858	Bazire, E.	1867	Thibaud, L. A.	1871
Pellereau, E.	1860	Galéa, H.	1867	Pelte, E.	1871
Martin Moncamp, P. G	1861	Lemière H.	1868	Desenne, O	1871
Rouillard, L	1861	Avice, H.	1868	Boucherat	1871
Chastellier, P. L	1864	Beaugeard, P.	1868	Galais, E.	1871
Delafaye, V.	1864	Pilot, G.	1868	Mathews, L. F.	1872
Guibert, G.	1864	Vaudagne, E.	1868	André, A.	1872
Newton, W.	1864	Hamon, A.	1869		
Lepoigneur, I.	1864	Lionnet, F.	1870		

ATTORNIES (actually practising).

Pastor, E	1840	Laval, V.	1860	Sauzier, M.	1866
Mercier, J.	1840	Chazal, P. E. de	1860	Sauzier, E.	1866
Lalandelle, G.	1842	St-Perne, E. P	1860	Commarmond, A	1867
Hewetson, W.	1846	Tessier, G	1860	Robert, A.	1868
Laurent, E.	1846	Victor, F.	1860	Desjardins, E.	1870
Ducray, E.	1848	Mallet, F.	1861	Rousset, C.	1870
Hitié, U.	1850	Ducray, V. G.	1861	Wohrnitz, L.	1870
Pignéguy, J.	1850	Gautray, C.	1861	Erny, P. J. A	1871
Pastor, H.	1850	Sicard, N.	1862	Rolando, A	1871
Colin, A J	1851	Simonet, F.	1863	St. Pern, L. de	1871
Pragassa, V	1851	Pitot, A	1863	Ganachaud, E.	1871
Guibert, J	1853	Bétuel, A.	1863	Ellie, J.	1871
Finniss, W.	1853	Boullé, V.	1863	Lastelle, F.	1872
Bouchet, J	1853	Rodesse, L. C.	1863	Edwards, E.	1872
Duvivier, Ed.	1853	Ritter, G A	1864	Leblanc, W.	1872
Robert, F.	1857	Perrot, A	1864	Margeot, E.	1872
Ackroyd, J	1859	Rohan, A	1864		
Desperles, L	1859	Gilot, F	1865		
Herchenroder, T.	1860	Halais, J.	1865		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 6.

CONTENTS:

EDITED BY E. DE LAPEYRE

BARRISTER AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY,—9, BOURBON STREET.

1873.

Le fait que la Cour Suprème a en apparence énoncé des vues coutradictoires au sujet de la remise en vigeur d'Ordonnances abrogées me fait hésiter, et je ne donne pas d'opinion.

—

Even if Article 2102 of the Code Civil is made applied to a matter of Commercial selling and buying, the possession of the goods having passed to the Official Assignee the privilege of vendor is lost thereby.

The fact that the Supreme Court has apparently inunciated contradictory views on the point of revival of repealed Ordinances makes me hesitate and I pronounce no opinion.

—

IN THE MATTER OF

JACOB HABIB,

ARRANGEMENT UNDER THE CONTROL OF THE COURT.

ABDOOL RAIMAN,—Plaintiff.

versus

ASSIGNEES OF THE BANKRUPT ESTATE ABOVE MENTIONED,—Defendant.

—

Before

The Honorable J. GORRIE, 2nd Puisne Judge and Commissioner.

—

E. PELLEREAU,—Of Counsel for Ramtoola Hajee Abdool Raiman.
J. G. TESSIER,—Attorney for the same.

L. ROUILLARD,—Of Counsel for the Bankrupt.
J. PIGNÉGUY,—Attorney for the same.

P. L. CHASTELLIER,—Of Counsel for the Official Assignee.

23rd September 1872.

In this case the Court granted a Rule calling upon the insolvent and upon the Official Assignee, to shew cause why certain goods which a creditor Abdool Raiman had been authorized by a judge's order to resume possession of, by means of a *saisie revendication*, should not be delivered and handed over to the said creditor.

The creditor Abdool Raiman alleges that on the 12th day of August, he sold to the said Jacob Habib 219 bags of Ballam Rice at $4 per bag payable 100 bags cash under discount of 7 per cent and 119 bags under discount of 7 per cent at 2 months date.

That delivery of the said goods was made partly on the 12th and partly on the 16th August, the delivery being completed on the latter date, but that no money or other consideration had been paid for the same.

That on the 19th of the same month, the said Jacob Habib applied to the Court under § 156 of the Bankruptcy Act, and on the same date an order was given putting the Official Assignee in possession of the goods and effects of the Insolvent. The order as regards the Official Assignee is in the following terms: "That Etienne Julius Herchenroder "be appointed to be Official Assignee of the "said matter, and the estate and effects of the "said petitioning debtor be possessed and re-"ceived by the said Assignee."

On the same day, the creditor Abdool Raiman applied to the judge in chambers for authority to attach the goods sold by him, to the said Jacob Habib, by way of *saisie revendication* he alleging that the goods were in the store of the insolvent in the same condition as when delivered with the mark of the applicant on the bags and bulk unbroken.

He obtained the authority prayed for, as regards the whole, 219 bags sold, the seizure to be made at his own risk and peril.

On the usher proceeding to the premises, still of the same date (19th August) his seizure was opposed by the Official Assignee, who, having with great and proper promptitude, acted in obedience to the order of the Court putting him in possession, was already on the spot, and engaged in taking over the stock and effects.

The words of the usher in his return are as follows: "Repaired to the shop of the said "Jacob Habib, where, being and speaking, "to Julius Herchenroder Esquire, Official "Assignee to the Court of Bankruptcy, to "whom I exhibited the original of the judge's "order and affidavit hereunto annexed, declared "to him that I was come in virtue and in exe-"cution of the aforesaid judge's order to effect "a *saisie revendication* of the said quantity of "219 bags of Ballam Rice marked F. B R. "sold by the said plaintiff to the said Jacob "Habib on the aforesaid 12th day of August "instant and which are to be found in his said "shop situate as aforesaid. Whereupon, the "said Julius Herchenroder in his aforesaid "capacity, declared to me that he formally "opposes himself to my *saisie revendication* "having come to take possession of the stock "in trade of the said Jacob Habib."

Pellereau for the creditor in support of his

application, to have the goods returned to him, quoted Art. 2102 of the Code Civil, and the case of Assignees Nalletamby against Assignees Labistour, reported in Piston 1863 page 161 to show that this Article had been enforced by the Court, in a matter of purchase and sale, and where the contention had arisen as this, has, in a matter of Bankruptcy.

The attitude assumed by Habib the insolvent and the Official Assignee, not only differed from that of the creditor, but they were somewhat at variance with other. Rouillard for the former maintained that the Art. 2102 was not applicable, in as much as the same Article itself contains the exception. "Il n'est rien innové aux lois et usages du "commerce sur la revendication" and that the laws of commerce sur la revendication were to be found in Articles 576 and 577, of the Code de Commerce. These he contended, although repealed by the first Bankruptcy Ordinance No. 10 of 1838, that Ordinance having itself been repealed by 33 of 1853; the anterior law had been revived and was in full force, in so far as not specially superseded by the new Bankruptcy Ordinance of 1853. He quoted the case of Tessier and Roux *vs.* Picquenard reported in Piston of 1864 page 133 to show that the Court regarded Article 576 of the Code de Commerce as being still in force. This being so the special Articles on *revendication* in that Code did not authorize the application which had been made by the creditor as his goods were not in *transitu* but were actually in the store of the Involvent and merged in his general assets, before any steps had been taken by the creditor.

Chastellier for the Official Assignee on the other hand, maintained that Book III of the Code de Commerce relating to Bankruptcy, including Article 576 had been abolished by the Ordinance No. 10 of 1838 and had not been revived by the general repeal of that Ordinance by the new Bankruptcy Act, which of itself contained a repeal of all Ordinances and laws inconsistent with its provisions.

Article 2102 of the Civil Code, however, he further argued, was not applicable, as the clause already quoted: "Il n'est rien innové aux lois et usages du commerce, sur la revendication"; showed that it was not intended to be applicable to commercial matters, and that although, our special laws, upon commercial revendication had been repealed, the Article could not simply, on that account, be held to apply to commercial matters, to which it was not intended by the legislator to apply, and in regard to which the provisions were in themselves not properly applicable His authorities were Troplong, "Privilèges et hypothèques," volume 1, in his commentary on this Article and especially Merlin *verbo* "privilèges de créance," § III, as showing that the Article 2102 had no application to commercial affairs. The decision in the case of Assignees of Nalletamby showed that Book III of the Code de Commerce relating to Bankruptcy had been repealed, but it did not go the length of applying Article 2102 to a commercial affair; nor were the provisions of Article 2102 any more than those of Article 576 of Code de Commerce applicable to this case.

Mr. Pellereau, in reply, admitted that Book III of the Code de Commerce relating to Bankruptcy was repealed, including the Articles defining the limits of revendication in commercial affairs, and this being so, Article 2102 of the Civil Code was the actual law on the subject of revendication, and the decision in Nalletamby's case, showed that the Article was applicable to general purchases and sales.

The cases of *Ravenel* and André Alcide, not reported, were quoted in support of the doctrine that Article 2102 was applied generally by the Court. The Code de Commerce was merely auxiliary to the Civil Code and did not deal with a class of questions to which the Civil Code could not possibly apply. On this point the observations of Troplong in his preface to his volume on "Nantissement" were referred to, as showing the true relation between the Code de Commerce and the Civil Code.

It was admitted, in answer to the Court, that there was no commercial usage on which the seizing creditor could found and that the text of the law as laid down in the Civil Code was the sole authority for the application.

JUDGMENT.

The general question here raised, viz: whether the Articles in the Code de Commerce relating to revendication have been definitively repealed, seems to have been differently regarded by the Court in the two cases quoted. There can be no doubt that the whole Book III of that Code was repealed by Ordinance 10 of 1838 and replaced by the provisions of that Ordinance. In its turn, however, the Ordinance 10 of 1838 has been repealed by 33 of 1853, and the latter Ordinance contains no new repeal of Book III, Article 215 of the latter Ordinance, is to the following effect: "Ordinance No. 10 of 1838, and all ordinances and laws contrary to the present Ordinance are hereby repealed." The question, therefore, whether the special Articles of the Code de Commerce on commercial revendication are definitively repealed is by no means free from difficulty.

In England, there was formerly a difference of opinion on the point whether when a repealing statute was itself repealed, the old law statutory, or common, was thereby revived.

The matter was then set at rest by the statute 13 and 14, Vic. c. 21, the fifth section of which provided that where any act repealing in whole or in part any former act, was itself repealed, such last repeal should not revive the act or provisions before repealed, unless words were added reviving such act or provisions.

In America, however, where the common law of England prevails, it is, I believe, still the law in those states which have not adopted a special law similar to the English act, that the old law, statutory or common, revives, by the simple repeal of a repealing act.

In Mauritius, we are under the regime of Codes of law and in particular the Code de Commerce regulates the commercial matters of the Colony. So far as regards the steps to be adopted and the rules to be followed in regard to Bankruptcy we are regulated by the Ordinance No. 33 of 1853 and any Article of the Code de Commerce, which is contrary to that Ordinance, is undoubtedly repealed and replaced by its provisions and those of the amending acts. But can we hold simply from the analogy of the authority of the English Statute, that all the provisions of Book III of the Code de Commerce are now abolished, the Ordinance repealing it having itself been repealed? Some of the Articles of that Book and especially the Articles relating to commercial revendication, are not opposed to the provisions of the Bankruptcy Ordinance actually in force. In fact, if we looked merely at the spirit and intention of the Bankruptcy Ordinances, the Articles on revendication in place of being opposed are in harmony with the objects contemplated by these Ordinances, the Article 567, for example, limits in commercial matters the revendication provided for by Article 2102 of the Code Civil. It confines the privilege within narrower bounds, and these bounds are defined with accuracy and precision. They were framed with a full knowledge of the principles of the laws of Rome and France on the subject of sale, and of the law of the Civil Code on the subject of privileges and were intended to favour commerce by rendering the privilege of the vendor more adapted to the expension of trade.

Moreover, unless we can read the Article 576 as still in vigour, Article 2102 of the Civil Code may unquestionably be made to apply in Mauritius, to what it was not intended to apply in France, and to what in all probability it would not have been left to apply here, had the legislature foreseen the effect of the repeal *en bloc* of Book III of the Code de Commerce, The sentence: "Il n'est rien innové aux lois et usages du "commerce sur la revendication," even without the formal explanations of Mr. Merlin &. Mr. Tarville, shows distinctly that the article was not intended to rule questions of revendication and that without being all to refer to the cognate Articles in the Code de Commerce, the legitimate application of the Article of the Code Civil will not be attained.

These considerations and the fact that the Supreme Court has apparently enunciated contradictory views on the point, would have made me hesitate, much before adopting the conclusion that the whole of Book III of the Code de Commerce stands, necessarily repealed by the effect of the Bankruptcy Ornances of 1838 and 1853.

Fortunately, there is enough in the case to enable me to decide the question raised by the rule without requiring any formal decision of the point creating the difficulty. It was admitted on all sides, by the creditor, by the Insolvent, and by the Official Assignee, that the *saisie revendication*, here attempted, would not have been justified under the Code de Commerce. The seizing creditor expressly based his claim upon Article 2102 of the Civil Code. Now whether this case can apply to a commercial matter on the supposition of the repeal of Article 576 of Book III of the Code de Commerce, (as to which I pronounce no opinion) there can be no doubt that before the Article can receive its applications, the facts of the case must come up strictly to the privilege allowed by the law. What are the terms of the Article? "Les créanciers privilégiés sur cer-"tains meubles sont, etc., 4o. le prix d'ef-"fets mobiliers non payés, s'ils sont encore "en la possession du débiteur, soit qu'il ait "acheté à terme ou sans terme."

"Si la vente a été faite sans terme, le "vendeur peut même revendiquer ses effets "tant qu'ils sont en la possession de l'ache-"teur, et en empêcher la revente, pourvu "que la revendication soit faite dans la "huitaine de la livraison, et que les effets "se trouvent dans le même état dans lequel "cette livraison a été faite."

Here the reclamation has been made within the proper time, if revendication were to be made of the goods sold cash the goods all alleged to be in the same state as when delivery was made, or as regards the whole number of bags sold, they are alleged to be in the possession of the debtor.

Now what are the facts as to possession? It has been admitted at the bar, that when the creditor went with the usher to the shop of the Insolvent, he found the Official Assignee already there. The return of the usher bears as we have seen, that the Official Assignee opposed himself to the seizure, and in the face of such a fact, can it be maintained that the possession of the goods remained with the buyer? The terms of the order of the court already quoted are "that "the state and effects of the said petitioning "debtor, be possessed and received by the said "Official Assignee. The Official Assignee placed himself immediately in possession and acting for the general body of creditors, properly opposed himself to the seizure.

In these circumstances I hold that even in the event of Art. 2102 being hold to apply to a matter of a commercial selling and buying of this kind, that the goods themselves could only be reclaimed for that portion of the rice sold *sans terme* and that both as regards that portion and the balance of the goods delivered, upon which the price might be claimed as privilege if the goods remained in possession of the debtor whether bought "a terme, où sans terme," that the possession had passed to the Official Assignee, and that any privilege which the vendor may have had under the Article was thereby lost.

The rule will accordingly he discharged with costs against the creditor Abdool Raiman.

SUPREME COURT.

—

FAILLITE,—SAISIE DE MARCHANDISES PAR LE SYNDIC OFFICIEL,—RÉCLAMATION DE CES MARCHANDISES,—POSSESSION,—EVIDENCE.

—

BANKRUPTCY,—SEIZURE OF GOODS BY THE OFFICIAL ASSIGNEE,—CLAIM OF THE SAME,—POSSESSION,—EVIDENCE.

—

Après avoir examiné attentivement l'affaire et l'évidence sous ses différentes phases, après avoir donné à la critique faite par l'Avocat sur les témoignages tout le poids qu'elle a, je suis arriré à la conclusion que là saisie faite par le Syndic Officiel doit être maintenue.

After a careful examination of the case and the evidence in its different bearings and giving all the weight to the criticisms of counsel on the evidence, I have arrived at the conclusion that the seizure made by the Official Assignee ought to be maintained.

—

In the matter of the Bankrupt estate of Aga Mahomed Hossen.

—

HOSSEN,—Plaintiff.

versus

ASSIGNEES OF THE BANKRUPT ESTATE ABOVE MENTIONED.—Defendant.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT., Chief Judge and Commissioner.

—

E. PELLEREAU,—Of Counsel for Plaintiff.
ED. EDWARDS,—Plaintiff's Attorney.

P. L. CHASTELLIER,—Of Counsel for Defen-
E. DUVIVIER,—Defendant's Attorney. [dant.

4th October 1872.

In this case the Bankrupt is a grain dealer in Royal street Port Louis.

On 26th of August last an application was made by the Official Assignee, that certain goods stated to be in the magazine of one Hossen also a grain dealer in the same street, should be seized, as being in truth the property of the Bankrupt and forming part of his Estate.

The Court, of the same date and after hearing the said Hossen and two witnesses, Sulliman Carimana and Ramtoola Hadjee Abdooraman found that a *prima facie* case had been established, that the Articles in question, formed part of the property of the Bankrupt, and authorized the Official Assignee to take possession of them.

We have now, under a rule to show cause, to deal with the question whether the possession of the Official Assignee, is to be maintained, or whether, the goods are to be restored to Hossen, in whose shop they are found.

Much evidence has been adduced in the inquiry, and the Court has been greatly embarrassed by the fact, that very few of the persons examined can speak, or read, or write English or French, by the absence of anything, even approaching to well kept business books, by the variety of trade marks on the goods and the little attention paid to those marks by the parties concerned in buying and selling the articles themselves, and by contradictions in the testimony of witnesses, even more flagrant, than they usually are, in cases of this description.

Having carefully considered the case and the evidence in its different bearings and giving all the weight to the criticisms of counsel upon the evidence, so far as appears to me just and reasonable, I have arrived at the conclusion, that the seizure by the Official Assignee in the Bankruptcy ought to be maintained. N. P. It is a remarkable fact in the inquiry that no fewer than 8 or 9 witnesses concur in deposing that on wednesday the 21st August last, the day immediately preceding that on which the Official Assignee, by order of the Court, entered in the possession of the Bankrupt Estate, Rice, Gram, Dholl, Bran, Oil, Soap, and other articles of Merchandize, were carried by a number of persons from the shop of the Bankrupt to that of Hossen, without interruption from about 8 o'clock in the morning to one or two o'clock in the afternoon.

The Bankrupt deposes to this delivery of goods, following he says, on a sale to Hossen for the purpose of raising funds to meet immediate pressing demands, but not one farthing of the price he solemnly affirms was ever paid by Hossen.

Hossen has denied point blank that there was any such transference of goods from one shop to the other on that day; so far as relates to his dealings with the Bankrupt, that on the earlier days of the said month of August he had received from the Bankrupt certain quantities of Rice, Dholl, Soap and Oil, that he had duly bought and paid for the said articles in good faith, not knowing that Aga Mahomed Hossen was in bad circumstances and would become a Bankrupt.

As already stated, the Court is satisfied after anxious consideration of the whole evidence, that the articles in question are the property of the Bankrupt Estate of Aga Mahomed Hossen, and consequently that the possession of the Official Assignee ought to be maintained.

The rule will accordingly be and is hereby discharged with costs.

SUPREME COURT.

—

TRANSFERT DE COMPTES,—RÉCLAMATION DE CES COMPTES,—ACTE DE SOCIÉTÉ,—LA RESPONSABILITÉ DES ASSOCIÉS N'EST PAS PERSONNEL,—EXAMEN DE COMPTES.

—

TRANSFER OF ACCOUNT, — CLAIM OF THE SAME,—DEED OF PARTNERSHIP,—PARTNERS LIABILITY NOT PERSONAL,—EXAMINATION OF ACCOUNT.

—

Les défendeurs ne contestent pas que les plaignants aient le droit d'obtenir un jugement contre la Guildiverie Centrale ; en exceptant le terrain sur lequel elle est bâtie et leur responsabilité personnelle. Jugement en ce sens.

Les plaignants peuvent maintenant exiger de voir les comptes pour en connaître l'état actuel. Les comptes sont renvoyés aux Master pour les examiner en présence des plaignants.

—

Defendants do not dispute that the plaintiffs are entitled to have judgment-against the Guildiverie Centrale saving and excepting the land on which it is built, and any personal liability of themselves. Judgement accordingly.

The plaintiffs are now in a position to insist on an inspection of account with the view of ascertaining what is the state of accounts at present. The accounts are remitted to the master to examine them in presence of plaintiffs.

—

WIDOW BUSSIÉ & ORS.—Plaintiffs.

versus

ALFRED DE ROCHECOUSTE & ORS. —Defendants.

AND

THE WIDOW AND HEIRS UNDER BENEFIT OF INVENTORY OF DANIEL MARTIN, —Intervering Parties.

Before

Honor Sir Ch. Farquhar Shand Kt.,
Chief Judge and
The Honorable Mr. Justice Bestel, First Puisne Judge.

—

P.L. Chastellier,—Of Counsel for plaintiffs.
G. A. Ritter,—Attorney for the same.

G. Guibert,—Of Counsel for Widow and Heirs Martin.
J. Guibert,—Attorney for the same.

P. E. de Chazal,—Attorney for Rochecouste.
L. Rouillard,—Of Counsel for Rochecouste.

W. Hewetson,—Attorney for Hart & Cantin.
The Hon. V. Naz,—Of Counsel for Hart & Cantin.

7th October 1872.

On the alleged authority of a deed of Partnership entered into between the defendants and certain other planters of the district of Grand Port, on the one side, and Richard Ambroise Robert on the other side; dated of the 5th September 1855 duly registered, and of certain subsequent proceedings following thereon, the plaintiffs as assignees of Aristide Boulanger then of Queen street, Port Louis, Merchant, claim from the Court judgment condemning the said defendant in their capacity of members of the board of control and supervision of a distillery known under the name of the *Guildiverie Centrale* at Mahebourg in the district of Grand Port, to pay to plaintiff the sum of $ 12,439.70 c., together with interest at 12 o/o per annum from the 28th February 1863, and costs on the following ground.

The distillery above mentioned, it is alleged in the declaration, was erected and worked for a series of years at Mahebourg district of Grand Port, under the name of *Guildiverie Centrale* and under the management of the above named Richard Ambroise Robert the alleged accredited agent thereof, who carried on the whole business thereof and entered into the necessary contracts in order to obtain the funds required to work the said concern. It is further alleged that the advances were made to the said *Guildiverie Centrale* by the said Aristide Boulanger in the years 1861 and 1862 as shewn by his accounts current with the said Distillery Central, begining on 1st January 1861 down to the 31st July 1862, and closed on the 28th February 1863. That the account alleged to be due to A. Boulanger, and to have been approved by the said Robert was transferred in 1869 by A. Boulanger to his wife and Widow Bussié the plaintiffs in this case.

Alfred de Rochecouste personally pleaded that as a member of the late committee of supervision and control of the *Guildiverie Centrale*, he has nothing to say in bar of plaintiffs declaration in so far as the plaintiffs right be exercised only against the goods, and property belonging to the said Company, and not against the buildings thereof which are the private and personal property of the said defendant leased to the Company for a period of 12 years. His plea accordingly concluded with the prayer that the Court do decree and order that the plaintiffs have no right to sue the defendant personnally and that the buildings to which are attached the distillery apparatus and accessories of the said distillery, and all the private and personal property of the defendant shall in no wise be interfered with and levied upon by plaintiffs.

Edward Hart and Lisis Cantin two of the defendants in the like capacity as de Rochecouste jointly and severally say.—

1o.—That the plaintiffs have no right or cause of action against them.

2o.—They deny being in any way indebted to the plaintiffs, and conclude to the dismissal of the action against them, whether as late members of the board of control or against them personally.

Thereupon issue was joined and on the day of trial de Rochecouste consented to judgment being given in favor of plaintiffs in so far only however as such judgment and its execution shall be limited to the goods and property of the Company, and shall not extend to any property personal to him the said defendant de Rochecouste.

The Honorable Mr. Naz on the same day and on behalf of Hart and Cantin stated at the Bar, that with regard to Boulanger's claim they did abide by the decision of the Court admitting that Boulanger was the agent of the *Distillery Central*, within the limits of the deliberations of the committee of management (or control) under date of the 8th November 1860, and assented that judgment whatever it might be, be given against the *Distillerie Centrale*, but not against Hart and Cantin personally, or against their personal estate whether for the claim itself or for costs.

Widow and heirs under benefit of inventory of Daniel Martin, moved for leave to

intervene in the suit agreeably to the notice served by them on all the parties in the cause. That intervention was allowed saving the rights of the several defendants on the merits thereof.

JUDGMENT.

The decision of this case depends upon the extent of the authority given to Robert by the deed of Partnership and the subsequent proceedings of parties, whether or not Robert had any authority to bind the defendants or the property of this association by any loan of money from any 3rd party whether Boulanger, Martin or any other person for the working of the Distillery Central at Mahebourg.

On reference to the agreement between the several parties thereto, we find : (*Clause 3*) that, " M. Robert *prend à sa charge toutes* " *les dépenses mensuelles, la patente, le per-* " *sonnel*, et, en un mot, tous les *frais* géné " ralement quelconques, *sauf ceux d'instal-* " *lation.*"

(*Clause* 4) that, " pour arriver à la cons- " truction de l'usine et pour faire face à toutes " les dépenses d'*installation*," the subscribers of the agreement " autorisent M. Robert " à se *mettre en rapport* avec un bailleur de " fonds qui ferait les avances nécessaires à " cet effet "

(*Clause* 5) that, " toutes les dépenses pour " *la construction* et l'installation de l'usine " seront faites sur l'autorisation du Comité de " Direction."

In (clause 7) it is agreed that " pour rem- " bourser *au bailleur* de fonds le montant de " ses avances en capital, intérêts et commission " les signataires lui consigneront tous les " produits de la guildiverie jusqu'à parfait " paiement."

The text of the agreement between the founders of the above distillery and Robert clearly shews that Robert's authority with regard to the construction of the *usine* and all other *expenses* d'installation of the distillery goes no further than allowing Robert to seek for a bailleur de fonds, (Clause 4) who, being found was to be reported to the committee of control and supervision, upon whose authorization alone the expenses of *construction and installation* were to be incurred, that the money lender for payment and mode of payment of his advances, (clauses 5 and 7) was to look to the committee who were to be liable.

On the other hand, it is formally stipulated between parties that Robert was to take to his charge all the monthly expenses, the license, the *personel* and in short all *expenses connected with the working* of the distillery and the repairs, which might be subsequently required by the usine, (clauses 9 and 10) finally, all eventualities save and except those arising from thunder, storms and hurricanes (clause 10).

The original agreement of the 11th July 1856, however, was modified at a meeting of the board of control held at " Beau Vallon " (the estate of Alfred de Rochecouste) on the 8th November 1860, when it was resolved that the new license should be taken out in the name of A. de Rochecouste ; 2o. That the rums should be deposited at Martin's stores in town ; 3o. That the proceeds of the sale of the rums should be paid into the Oriental Bank ; 4o. That the checques should be drawn by the President of the Committee ; 5o That " à partir du 1er Décembre prochain (1860) " M. Boulanger est nommé Agent de la Guil- " diverie Centrale au Port Louis à l'unanimité " des voix, sauf celle de M. Hart."

Les Conditions de cette agence sont les suivantes :

1o.—" Honoraires de $100 par mois, paya- " bles moitié pour compte des fondateurs " et moitié pour compte de M. Robert.

2o.—" L'Agent est chargé de recevoir les " rums au Port Louis et d'en disposer " selon les instructions qui lui seront " données par le Président du Comité.

3o.—" Toutes sommes provenant de ventes " de rum ou autrement seront touchées " par lui et déposées à la Banque inté- " gralement et les reçus de la Banque " envoyés au Président.

4o.—" Un compte de gestion sera fourni " chaque mois par Doit et Avoir de tous " mouvements de fonds."

5o.—" Après chaque Balance trimestrielle " du Gouvernement un compte de rum " sera fourni au président.

6o.—" Les Barriques vides seront retournées " avec une rigoureuse exactitude.

7o.—Toutes sommes a payer le seront par " mandats du Président sur la Banque."

8o.—" Monsieur A. de Rochecouste est " constitué dans la présidence du comité."

Signé A. DE ROCHECOUSTE,
Président du Comité.

A letter under date of the 11th April 1862 addressed by A. de Rochecouste to Daniel Martin shews a further modification of the above resolution of the Committee of Control by the President having allowed Daniel Martin taking out the license in his Martin's name.

" Mon cher Daniel (that is Daniel Martin) " je te prie de ne pas oublier qu'en t'autori- " sant a prendre la patente cette année pour " la Distillerie Centrale, je t'avais mis pour " condition que les premiers fonds après pré- " lèvement des frais courants devaient être " consacrés a Dulac et à Boulanger je con- " sentais a venir ainsi que les autres créanciers " de l'usine après ces deux créances."

" Tu m'avais même dit que tu ferais des " réglements avec ces deux Messieurs. Rien " de semblable n'a encore été fait, car j'ai " reçu des réclamations de Dulac et au- " jourd'hui j'en reçois une de Boulanger, je " viens te prier de t'occuper sérieusement de " ces deux réglements avant tous autres " comptes."

" Boulanger demande une avance pour le " réglement des frais de procédure concernant " la guildiverie pour lequels il est poursuivi, " je te prie instamment de la lui faire à valoir " sur son compte."

Signé A. DE ROCHECOUSTE.

What precedes clearly shews that the defendants do not dispute that the plaintiffs are entitled to have judgment against the *Guildiverie Centrale*, saving and excepting the land on which it is built, and any personal liability of themselves.

To this extent and no further we accordingly find and decide that the plaintiffs shall have their judgment against the said Guildiverie, without costs.

Daniel Martin under a judgment of reference made a rule of this Court of the date the 12th December 1865 was in his life time in possession of the Guildiverie Centrale; this possession has been retained by his widow and representatives to enable them to work off Martin's debt.

We find that the plaintiffs are now in a position to insist on an inspection of their accounts, with the view of ascertaining what is the state of those accounts at present. We shall and do therefore make a remit to the Master to examine the accounts of Martin in presence of plaintiffs, and to state the balance whatever it may be as at the present date. Other questions of costs reserved.

SUPREME COURT.

—

MORT D'UN DÉFENDEUR, — SUGGESTION, — PLAIGNANT ÉTRANGER, — CAUTION JUDICATUM SOLVI.

—

DEATH OF A DEFENDANT, — SUGGESTION, — FOREIGN PLAINTIFF, — CAUTION JUDICATUM SOLVI.

—

Le plaignant a rempli la condition qui lui a permis de poursuivre son action, et rien n'est arrivé de si innattendu et de si exceptionnel pour permettre à la Cour d'étendre la garantie JUDICATUM SOLVI. *Un pareil ordre n'aurait d'autre effet que de fermer complétement au plaignant les portes du tribunal.*

—

Plaintiff has fulfilled the condition on which he was allowed to prosecute his suit, and nothing of so unexpected or exceptional a nature has since arisen to warrant the Court in enlarging the security JUDICATUM SOLVI. *Such an order might have the effect of closing the door of the Court altogether on the plaintiff.*

—

PIERCE, — Plaintiff.

versus

CHANNELL, — Defendant.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT., Chief Judge and
The Honorable MR. JUSTICE BESTEL, First Puisne Judge.

—

E. PELLEREAU, — Of Counsel for Plaintiff.
J. MERCIER, — Attorney for the same.

W. NEWTON, — Of Counsel for Defendant.
J. H. ACKROYD, — Attorney for the same.

—

16th October 1872.

One of the Defendants in this case having died, the Plaintiff, moved in terms of rule 81 of Court, for leave to enter a suggestion and the names of the representatives of the deceased Defendant on the record, that the suit might be proceeded with.

Of the representatives of the deceased Defendant, some were in the Colony and now appeared in the case by counsel, some were abroad and were represented by the Curator of Vacant Estate, Leclézio for the latter contended that his position was peculiar as he represented absent parties to whom he would have to give an account and who might ultimately abandon the succession, that the Court ought therefore to order the Plaintiff as a foreigner, before proceeding further to find additional security *judicatum solvi*—that the £ 100 already allowed is not sufficient looking at the unlooked for development of the case, some of the other Defendants joined in this application.

PELLEREAU contra: There is nothing peculiar or unexpected in the case. The death of a Defendant causes no such change, as to warrant an additional burden being laid on the Plaintiff which might have the effect of preventing him going on at all. The Curator is a public officer representing, the interests of absent parties here, just like other heirs.

THE COURT.

We do not think that there is any peculiarity arising from the fact of some of the heirs being represented by the Curator of Vacant Estate which takes this case out of the usual category. We do not see our way to lay a heavier burden on this foreign Plaintiff at the present advanced stage of the case, than he was subjected to, at the outset. He has fulfilled the condition on which, he was allowed to prosecute his suit, or nothing of so unexpected or exceptional a nature has since arisen, as to warrant the Court in exercising the discretion which it may possess of enlarging the caution, originally found, when it turns out to be altogether inadequate for the reasonable protection of his opponent, such an order might have the effect of closing the door of the Court altogether on the Plaintiff. Motion refused.

SUPREME COURT.

—

RÉCLAMATION DE COMPTE,—MARCHANDISES VENDUES ET LIVRÉES,—EVIDENCE.

CLAIM OF ACCOUNT,—GOODS SOLD AND DELIVERED,—EVIDENCE.

—

Nous sommes d'opinion que le plaignant a prouvé que les marchandises qu'il réclame (excepté celles qui furent vendues dans le mois de Juin pour la livraison desquelles le témoignage du commis du plaignant n'est pas concluant) furent vendues à Allock et au défendeur, Jugement pour le plaignant pour la différence de $ 677.90 *avec la moitié des frais taxés*

—

We are of opinion that the plaintiff has shewn that the goods now sued for (with the exception of those sold in the month of June to the delivery of which into the defendant's store the plaintiff's clerk cannot speak) were sold to Allock and the defendant Judgment in favor of plaintiff for the balance of $ 677.90, *with one half of the taxed costs.*

—

AJUM GOOLAM HOSSEN,—Plaintiff.

versus

AH: SING,—Defendant.

—

Before

His Honor Sir CH. FARQUHAR SHAND, KT., Chief Judge and
His Honor Mr. Justice BESTEL, First Puisne Judge.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiff.
G A. RITTER,—Attorney for the same.

W. NEWTON,—Of Counsel for Defendant.
E. SAUZIER,—Attorney for the same.

22nd October 1872.

In this case the Plaintiff alleges that the Defendant is indebted to him in the sum of $ 945.11 being the amount of an account for goods sold and delivered by the Plaintiff to the Defendant, at his request and for his trade from the twenty second day of June to the twenty fourth day of August present year.

The Defendant denies all knowledge of the Plaintiff and of the alleged sale.

The case of the Plaintiff is of this nature. He alleges, that he dealt with a Chinaman, whose name is now said to be Allock, who has lately disappeared, believing his name to be Ah: Sing, which is the name of the Defendant, that this Allock and the Defendant came to his shop together for the purpose of purchasing goods, that the Plaintiff sold and delivered to them the goods in question relying on the credit of the Defendant as owner of the shop at Rose-Hill, into which the goods were conveyed directly from the store of the Plaintiff.

Much of the difficulty in dealing with cases of this description arises from the fact, that the parties are of different nationalities and do not anderstand the language of each other, and are usually but very imperfectly acquainted with the creole tongue, in which they do business, together.

We have carefully considered the evidence on both sides and of course the Plaintiff must establish his case and satisfy the Court that he has made out his claim in law, in whole or in part; before he can succeed in obtaining judgment against his opponent, now, we are of opinion that the plaintiff has shewn that the goods now sued for, with the exception of those in the month of June last, (to the delivery of which into the defendant's store, the plaintiff's clerk cannot speak), were sold to Allock and the defendant in company together, the plaintiff believing that they were both his debtors, in the transaction and liable to pay the price or at least, believing from the conduct of parties that defendant was the true purchaser and the goods in point of fact were delivered into his, the defendant's store, the defendant thus had the benefit of the goods, the price of which, we are satisfied, has never been paid to the plaintiff.

To this extent, therefore, and no further we think the plaintiff has proved his case, and is entitled to a decree, we therefore now give judgment in his favor for the balance, viz: the sum of $ 677.90 with one-half costs of suit as they may be taxed by the Master.

And the provisional seizure made on the 30th August last by usher Mai, of the goods of the said defendant, be converted into a *saisie exécution*. Costs to be paid out of the proceeds of such sale.

SUPREME COURT.

—

RESTRICTION DU DROIT DE QUITTER LA COLONIE POUR UN FAILLI,—ORDONNANCE No. 29 DE 1871,—DROIT DE LA COUR SUPRÊME DE FORCER UN FAILLI A FOURNIR CAUTION SUFFISANTE POUR NE PAS QUITTER LE PAYS AVANT QUE L'ON AIT PRONONCÉ UN JUGEMENT DÉFINITIF DANS SON AFFAIRE,—EVIDENCE.

—

LIMITATION OF THE RIGHT OF DEPARTURE FROM THE COLONY OF A BANKRUPT,—ORDINANCE No. 29 OF 1871,—RIGHT OF THE SUPREME COURT TO FORCE BANKRUPTS TO FURNISH SUFFICIENT SECURITY NOT TO QUIT THE ISLAND UNTIL FINAL JUDGMENT,—EVIDENCE.

—

Considérant la tendance qu'à la loi à restreindre l'emprisonment pour protéger les droits du créancier, je suis d'opinion que; à moins que l'on prouve clairement que le failli tombe sous le coup de l'Ordonnance, il ne peut être retenu en prison ou obligé de fournir caution.

—

Looking at the inclination of the law now-a-days to restrict imprisonment so far as protection to creditors is concerned, I am of opinion that unless the evidence is clear that the Bankrupt is within the Ordinance he cannot be kept in prison or forced to furnish security.

—

HASSEM VALY,—Plaintiff.

versus

FRED. RICHER & Co.,—Defendant.

—

Before

Sir CHARLES FARQUHAR SHAND, KT.,
Chief Judge.

—

W. NEWTON,—Of Counsel for Plaintiff.
F. ROBERT,—Attorney for the same.

L. ROUILLARD.—Of Counsel for Defendant.
P. E. DE CHAZAL,—Attorney for the same.

23rd October 1872.

After the law was abolished in 1871 which required the observance of certain formalities

before a person could quit the colony, a limitation upon the general right of departure was placed by Ordinance No. 29 of the same year by its second section which enacts as follows: "It shall however be lawful for a Judge of the Supreme Court in Chambers whenever it shall be proved to the satisfaction of such Judge that there is probable cause for believing that any person who has been duly adjudicated a Bankrupt, or any person who has petitioned the Court for leave to make a *Cessio Bonorum*, or who has petitioned the Court for an arrangement under the control of the Court, is about to quit the colony before final judgment on the question of the Bankrupt's certificate, or before final judgment, on the question of the Petitioner's arrangement under the control of the Court, to issue a warrant directed to any officer of the Court whereby he shall have authority to arrest such Bankrupt or Insolvent or Petitioner and him to detain in custody until such Bankrupt or insolvent or Petitioner shall have given good and sufficient security not to quit this colony until final judgment aforesaid or until a further order of the Court.

Provided that it shall also be lawful for the Judge in Chambers not to issue his warrant in the first instance but to grant an order to shew cause returnable in Chambers or before the Court, why such warrant should not issue.

In the present case, on the affidavits of respectable traders that there was reasonable ground for believing that Hassem Valy, an Arab trader in this Colony, who had lately been adjudicated Bankrupt was about to depart the Island and on the affidavit of an usher of this Court who had been charged with the execution of a writ against him, that the said Hassem Valy could not be found though diligent search had been made for him, the Judge at Chambers on the morning of the day of the departure of the Mail, granted a warrant for his apprehension under the above law of 1871. The party was found by the usher and committed to jail.

On a rule at his instance to shew cause why the warrant should not be set aside on the grounds set forth by the said Hassem Valy in an affidavit, vitz: that the allegations that he was about to leave the Island and that his brother had left the colony with money belonging to him, the deponent, were false, that on the days when he could not be found, he had spent the greater part of the time in the office of his sollicitor in order to give him full explanations of his affairs, he being in Bankruptcy, the Judge at Chambers fixed an early hearing for the hearing of the case and allowed both parties to adduce such evidence as they might be advised to lead.

A number of witnesses have been adduced on both sides, and the issue before the Court, taking the whole case into consideration from first to last, is to say whether it is satisfied, that probable cause did exist, for believing that the Bankrupt was about to quit the colony.

It was admitted by the Counsel for the Bankrupt, that at the time when the warrant was issued, no other cause could reasonably have been followed then to issue the warrant, but now that the whole case, in all, its portions was thoroughly investigated, it was proved that the Bankrupt had no intention to leave the Colony, and that the fears of his creditors had given rise to certain rumors which gradually as in all such cases become more general, till some persons were led to believe on no certain evidence that the Bankrupt was about to quit the Island sureptitiously. It appears to me that looking at the whole case as now before me, there is a good deal of evidence to support the view of the Bankrupt's Counsel, but those rumors are so far at least traced to the Bankrupt himself, who is stated to have alluded in conversation to the possibility of his leaving the Colony, if his affairs did not go well. But, looking at the inclination of the law, now-a-days to restrict imprisonment in cases of debt, the inefficacy, so far as protection to creditors is concerned, of imprisonment in a case like this, or the finding of such caution to remain in the Colony as a Court could order. I am of opinion that unless the evidence is clear that the Bankrupt is within the Ordinance, the Court will not keep the Bankrupt in prison after a careful review of the evidence. I am not satisfied that the Bankrupt did intend to leave the Colony or that there was really probable cause for so believing, I find the existence of positive facts leading to this conclusion is wanting, and I shall therefore now make an order for his discharge from Jail. His conduct will no doubt be thoroughly investigated in the Court of Bankruptcy and due punishment allotted to him if he deserve it, order to issue for discharge of the Bankrupt from Jail. No costs to either party.

SUPREME COURT.

—

APPEL AU CONSEIL PRIVÉ,—DÉLAI,—POUVOIRS QUE LA COUR A DE PERMETTRE L'APPEL.

—

APPEAL TO THE PRIVY COUNCIL,—DELAY,—POWER TO GRANT LEAVE BY THE COURT.

BOLGERD,—Appellant.

IN RE :

PERROT,—Plaintiff.

versus

BOLGERD AND ANOR,—Defendant.

GERARD,—Intervening Party.

—

Before

His Honor Sir CH. FARQUHAR SHAND, KT., Chief Judge and
His Honor Mr. Justice BESTEL, First Puisne Judge.

—

BOLGERD,—Appeared for himself.
F. SIMONET,—Attorney for Bolgerd.

G. GUIBERT,—Of Counsel for widow Perrot.
E. PASTOR,—Attorney for the same.

G. GUIBERT,—Of Counsel for Gerard.
J. PIGNÉGUY,—Attorney for the same.

23rd October 1872.

In this case as in the numerous suits to which Mr. Bolgerd has been a party, in this Court, we have extended to him, much more than the usual indulgence as he has acted without professional assistance.

We have over and over again assigned that assistance to him, but as he usually insists on conducting his cases in his own way, that aid has been of little use to himself or the Court.

Looking at the dates in the present case, it would appear, that the time within which the formalities for presenting an appeal to the privy council and the finding of caution by the intending appellant, has expired. We shall now hear parties on this point for *primâ facie*, at least, it would appear that our power to grant leave to appeal is gone.

SUPREME COURT.

—

ACTE DE VENTE,—LES TERMES AMBIGUS OU OBSCURS SONT INTERPRETÉS CONTRE LE VENDEUR,—ART. 1602, 1603 CODE CIVIL.

DEED OF SALE,—AMBIGUITIES AND OBSCURITIES OF MEANING IS READ AGAINST THE VENDOR,—ART. 1602, 1603 CODE CIVIL.

—

MARION,--Plaintiff.

versus

TYACK,—Defendant.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT., Chief Judge and
The Honorable MR. JUSTICE BESTEL, First Puisne Judge.

—

T. L. JENKINS,—Of Counsel for Plaintiff,
F. SIMONET,—Attorney for the same.

L. ROUILLARD,—Of Counsel for Defendant.
J. PIGNÉNUY,—Attorney for the same.

23rd October 1872.

This is the sequel of the case in which a former judgment was given under the date of 16th July last. In obedience to that judgment Clément Galdemar and Alfred Ducray appeared in Court, by their Counsel.

They stated that their views of the case coincided more with these of the plaintiff than of the defendant, that they did not understand that Alfred Ducray had by the conveyance to the defendant in 1869 intended to sell the one acre which had been conveyed to him by his father in 1866.

It appears to us that whatever right of property Alfred Ducray had in the land in question or in any part of it, the whole of his rights were conveyed by him under the deed to the defendant dated 20th June 1869 prior to the deeds in favor of Galdemar, the author of the plaintiff. Ducray was one of the grantors of that deed of 1869 under which the whole 20 acres were sold and conveyed to Tyack the defendant. There was no restriction or reservation whatever of any part of the subjects to which it might happen that Alfred Ducray had a double title, he and the other vendors declared that they sold, the entirety of the lands "pour Monsieur Tyack, jouir, faire "et disposer du tout, comme de chose lui "appartenant en toute propriété au moyen "des présentes."

We need not say that by the rules of the code, the vendor ought to express his meaning clearly in the deed of sale, that all obscurities or ambiguities of meaning are read against him,—" Le vendeur est tenu d'expliquer " clairement ce a quoi il s'oblige, tout pacte " obscure ou ambigu s'interprête contre le " vendeur, C. C. Articles 1602, 1603."

Judgment will therefore be entered for the defendant with costs, any rights which the plaintiff may have against other parties reserved.

SUPREME COURT.

—

RÉCLAMATION D'UN DÉPÔT,—CESSION DE PRIORITÉ.—LE PLAIGNANT NE PEUT RÉCLAMER CE DÉPOT AVANT D'AVOIR PROUVÉ QUE LES DÉFENDEURS ONT ÉTÉ PAYÉS EN TOTALITÉ,—LA NON-MENTION D'UNE INSCRIPTION DANS LE CERTIFICAT D'INSCRIPTIONS D'APRÈS LEQUEL UN ORDRE A ÉTÉ ÉTABLI NE DOIT PAS ÊTRE CONSIDÉRÉ COMME UNE EXTINCTION DE LA DETTE.

—

CLAIM OF A DEPOSIT,—CESSION OF PRIORITY,—PLAINTIFF CANNOT CLAIM THE DEPOSIT UNTIL HE PROVES THAT THE DEFENDANTS HAVE BEEN FULLY PAID,—THE NON-MENTION OF AN INSCRIPTION IN THE CERTIFICATE OF INSCRIPTIONS UPON WHICH AN ORDRE WAS ESTABLISHED MUST NOT BE INFERRED AS AN EXTINCTION OF A DEBT.

—

MONCAMP,—Plaintiff.

versus

LE CREDIT FONCIER DE ILE MAURICE VOLCY DE SENNEVILLE AND AUGUSTE BELLET,—Defendants.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT.,
Chief Judge and
His Honor MR. JUSTICE BESTEL,
First Puisne Judge.

—

E. PELLEREAU,—Of Counsel for Plaintiff.
F. MALLET,—Attorney for the same.

L. ROUILLARD,—Of Counsel for Defendants.
J. PIGNÉGUY,—Attorney for the same.

23rd October 1872.

The declaration in this case alleges that according to a deed of partition of the goods belonging to the community which had existed between Philippe Gaston Martin Moncamp and Elise Mollière his deceased wife, an attribution was made to the Plaintiff Jules Evenor Martin Moncamp of a sum of $4256.27 2/5c. in bare ownership, and of similar sum in usufruit, to be paid by the said Philippe Gaston Martin Moncamp, the above sums making a total sum of $8512·50 3/5c. which were hypothecated on the sugar Estate *Le Souffleur* situate at Grand Port, then belonging to the said Philippe Gaston Martin Moncamp. That the Crédit Foncier of Mauritius, made a loan of $130,000 to the said Gaston Martin Moncamp and Edgard Martin Moncamp, then residing at Grand Port.

That to secure payment of the said sum of $130,000, the said Philippe Gaston Martin Mancamp & Edgard Martin Moncamp, mortgaged the sugar Estate *Les Mares* in the district of Grand Port, then belonging to them, and the sugar Estate *Le Souffleur* in the same district, then belonging to the said Philippe Gaston Martin Moncamp.

That in the deed of loan intervened amongst other persons, the Plaintiff in this case, first privileged creditor upon the said sugar Estate *Le Souffleur* who gave the " Crédit Foncier de l'Ile Maurice " in the persons of the Defendants all priority and preference over his, the Plaintiff's claim, on the said Estate *Le Souffleur*, that by a subsequent deed of the 17th November 1865, signed by the Defendants the loan above mentioned was realized, and it was further stipulated that " Le Crédit Foncier de l'Ile Maurice," should keep and retain, as in fact they did keep and retain the sum of $2500 alleged to be due by the said Philippe Gaston Martin Moncamp to Messrs. Rudelle, Pipon and Vinay, for the sale price, in principal and interest of a portion of land, admeasuring 62 acres, 84 perches, known by the name of *Montagne Chaonet* forming part of the sugar Estate *Le Souffleur* and the sum of $305.50 alleged to be due by the said Philippe Gaston Martin Moncamp, to the Mauritius Government which sums amounting together to the sum of $2805.50c. " Le Crédit Foncier de l'Ile Maurice " bound themselves to refund with interest at nine per centum per annum, from the date of the said deed on justification of the payment of the said sums

alleged to be due to Messrs. Rudelle, Pipon and Vinay and to the Mauritius Government, that the said Crédit Foncier had received its interest for the loan of $130,000, long before the date of the seizure of *Les Mares* and *Le Souffleur* Estates.

That the said Crédit Foncier had been collocated on the sale price of *Les Mares* for $116,500, with interest from the day of the said sale and on the sale price of *Le Souffleur*, for the sum of $25,860 with interest from the day of the said sale.

That the said two collocations amounting together to the sum of $ 129,523.22c. leaved a balance in favor of the Crédit Foncier of $476.78, that as first privileged creditor on the Estate *Le Souffleur*, the Plaintiff has the right to claim from the Defendants individually and personally and from the Crédit Foncier the said sum of $2805.50c. deposited as aforesaid in the hands and left in the custody of the said Crédit Foncier, minus the balance aforesaid of $476.78.

That the certificates of inscriptions of the 5th November 1866, upon which the ordre, was established, makes no mention of the inscription, of the Mauritius Government, whence must be inferred the extinction of the above two debts, if they ever had any existence.

That at all events the Crédit Foncier de l'Ile Maurice having received the two sums above mentioned, on the ordre of *Les Mares* and *Le Souffleur*, have no right to require from the Plaintiff, the justification mentioned in the notarial deed of the 7th November 1865.

That the said sum of $2805.50c. was entrusted to the Defendants as a deposit subject to the justification above alluded to, and was quite foreign to the loan of *Le Crédit Foncier* de l'Ile Maurice, therefore the Defendants were personally responsible for the restitution of the said sum of $2805.50c.

The declaration concludes with the prayer for judgment against the Defendants, condemning the latter to refund and restitute to the Plaintiff the said sum of $2805.50, minus the sum of $476.78, so deposited and kept by the *Crédit Foncier de l'île Maurice* with interest at 9 per centum per annum from the 17th November 1865 to the date of the judgment to be given on the present action.

The Defendants jointly and severally pleaded, that the Plaintiff was without right of action against them personally and individually and prayed that they be put out of the cause with costs.

And the said Auguste Bellet, acting on behalf of and in his capacity of manager of the anonymous Company or Society, known under the name of "Le Crédit Foncier de l'Ile Maurice" firstly traversed the whole declaration denied being indebted to the Plaintiff, averred, that far from being the debtor of Plaintiff in any amount whatever with respect to the loan made by them to Hippolyte Lemière and wife, to P. Gaston Martin Moncamp and wife and to Edgard Martin Moncamp, in the declaration referred to, was on the contrary the creditors of the latter of a balence of $3342.28 value of the 17th May 1866, as shown by bill of particulars annexed to the plea. The said Defendant Bellet accordingly prayed for a dismissal of the action with costs.

The replication merely re-averred the facts alleged in the declaration, issue was joined, parties were heard.

JUDGMENT.

Parties are agreed upon the facts of this case, the plaintiff expressly admits in his declaration, that in the deed of loan, intervened amongst other persons, he the plaintiff, first privileged creditor, upon the said sugar estate *Le Souffleur* and gave Le Crédit Foncier de l'Ile Maurice, in the persons, of the Defendants, all priority and preference over his. the Plaintiff's claim, on the said Estate *Le Souffleur*.

That on the realization of the deed of loan by a subsequent deed of the 17th November 1865, it was therein, stipulated that the said Credit Foncier, should keep and retain, as in fact, they did keep and retain the sums of $ 2,500 and $ 305 alleged to be due by the said Philippe Gaston Martin Moncamp to the parties in the deed referred to for the causes therein stated, the said two sums amounting together to the sum of $ 2,805.50, which said sums, the said Crèdit Foncier, bound themselves. to refund with interests at nine per centum, per annum, from the date of the said deed, viz: 17th November 1865 on justification by the borrowers of the payment of the said sums alleged to be due.

It is that total sum of $ 2,805.50 which the plaintiff were sicks to recover from the defendants, in person, and from the said Credit Foncier, minus however a sum of $ 476.78, the balance admitted to be due by the plaintiff to the said Crédit Foncier, collocated as they have been at the ordre *Les Mares* for $ 116,500 with interest from the

day of the sale thereof, and for $258,60 at the ordre of *Le Souffleur* with interest from the day of the sale of the said last mentioned Estate.

The Company upon the whole have recovered, by those two collocations the total sum of $ 129,523.—The amount of the loan being $ 1,30.000 and the sum received by the said Crédit Foncier $ 129,523 it necessarily follows that the Company are creditors of the difference between the two sums.

The account of the Company, the correctness of which, was not disputed shews, that the original borrowers though credited with the total sum now claimed by the Plaintiff, the Company nevertheless are still creditors of the original borrowers of the large sum of $3342.28.

The Plaintiff having ceded his right of priority and preference to the Defendants until perfect payment, it necessarily follows that in order to recover the funds now claimed, the Plaintiff must prove that the Defendants have been fully paid. Without this proof the Company are fully warranted in withholding the monies entrusted to them, and applying the same towards the extinction of this claim.

In order however to avoid the logical inference, of the above facts, the Plaintiff put in a contract made by and between the Defendants of the one part and Messrs. Quéland & Nestor Martin Moncamp of the other, under date of the 30th July 1866 duly registered, whereby, time was given by the Company to those two new owners by purchase, to pay off the amount of the loan, made to the previous and original owners and borrowers.

It was then contended that the extension of time allowed, to the new purchasers, by the Company, brought about a novation, the effect of which in law was to exonerate the original debtors and of course, their surety the now Plaintiff from further liability.

In the first place, in order that novation should take place, upon the substitution of a new debtor, the former debtor must be discharged by the creditor Quéland and Nestor Martin Moncamp undertaking to pay the loan encumbering the estate of their predecessors; the Company allowed the amount of their loan to continue on the estate just as if the estates, *Les Mares* and *Le Souffleur* had never changed hands, and far from releasing the former owners their original debtors, and the surety, the Plaintiff, it was expressly stipulated in the contract, with Quéland and Nestor Martin Moncamp, that "la présente prorogation de délai est consentie par la Compagnie le Crédit Foncier de l'Ile Maurice, sous la réserve expresse de ses droits, actions, privilège et hypothèque, résultant de sa créance, sans novation, ni dérogation pour les exercer, s'il y a lieu, en cas d'inexécution des présentes conventions."

Be it further observed that the Plaintiff was no party to the deed of *continuation du prêt* and without therefore right to avail himself thereof, to discharge himself from his liabilities to the said Crédit Foncier.

The action against Senneville and Bellet in their private character must be dismissed with costs. They having evidently acted for and on behalf of the Company.

The action directed against Bellet in his capacity of manager of the Company, le Crédit Foncier de l'Ile Maurice, must in like manner be dismissed with costs against Plaintiff.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT, ART. 40 DU CODE PÉNAL,—DEUX ACCUSATIONS DISTINCTES DANS LA MÊME INFORMATION,—POSSESSION D'OBJETS VOLÉS SANS EXCUSE OU JUSTIFICATION SUFFISANTE ET RECELEUR D'OBJETS VOLÉS SACHANT QUE CES OBJETS AVAIENT ÉTÉ VOLÉS —L'INFORMATION OBSCURE DOIT EMBARRASSER LA DÉFENCE,—JUGEMENT INFIRMÉ.

—

APPEAL OF A JUDGMENT OF DISTRICT MAGISTRATE,—ART. 40 OF THE PENAL CODE. —TWO DISTINCT CHARGES IN THE SAME INFORMATION, — POSSESSION OF STOLEN PROPERTY WITHOUT SUFFICIENT EXCUSE OR JUSTIFICATION AND RESETTER OF STOLEN GOODS WELL KNOWING THE SAME TO HAVE BEEN STOLEN,—THE OBSCURITY OF THE INFORMATION MUST EMBARRASS THE DEFENCE,—JUDGMENT QUASHED.

—

TEEROOVENGADON,—Appellant.

versus

THE QUEEN,—Respondant.

—

Before

His Honor Mr. Justice Gorrie, Second Puisne Judge.

—

W. Newton,—Of Counsel for the Appellant.
M. Sauzier,—Attorney for the same.

The Subs. Proc. & Adv. Gen.—Of Counsel for the Crown.
J. Bouchet,—Attorney for the same.

29th October 1872.

In this case the Appellant had been charged before the Junior District Magistrate of Port Louis, with having in his possession without sufficient excuse or justification one copper pump, the property of one Shamamode Moussa of No. 50, Royal street, "well knowing the above pump to be stolen property."

The Junior District Magistrate convicted the accused "of having been knowingly and without sufficient excuse or justification, found in possession of stolen property."—Art. 40 of the Penal Code provides that "those who knowingly shall have received" in whole or in part, or who without sufficient excuse or justification, shall have been "found to have in their possession articles" carried off, abstracted or obtained by "means of a crime or misdemeanour" shall be held and punished as accomplices in such crime or misdemeanour.

The Court had recently the opportunity of considering this article in the appeal "Aubagaron *v.* The Queen" heard before the Bail Court on 29th April last, and it was then laid down that the article setforth two modes in which persons might so act as to constitute themselves accomplices to the crime or misdemeanor, the one that of "knowingly receiving the articles, and the other that of being found in possession of such articles without sufficient excuse or justification."

The former implies a guilty knowledge of the crime and receiving the articles thereupon the latter forms a wider net to include those against whom that actual knowledge may not be capable of proof but who in the other hand are found in possession of the articles without being able to give such an account of their possession as to show good faith. The second head of the article is not to be found in the French Penal Code.

It was then also laid down that the charge ought to specify the exact offence alleged against the accused and that the conviction ought to be strictly in harmony with the charge.

In this case we have the information beginning apparently under the second head of the article viz: that the accused had in his possession without sufficient excuse or justification a certain article, but adding the words; "well knowing the above pump to be stolen," which would bring the offence under the first head if it had made mention of "receiving" which is of the essence of the offence described in the first branch. The conviction on the other hand is for "knowingly" and without sufficient excuse or justification being found in possession of stolen property—a form of words differing somewhat from the charge and as it stands neither accurately setting forth the offence under the one head nor the other of the Penal Code.

Before, however, determining whether this is sufficient of itself to invalidate the conviction, it appears to me that the objection taken by the appellant that there was in the information no sufficient specification of the crime in which the accused was alleged to be an accomplice merits a very careful examination.

The first head of Art. 40 sets forth the offence of "knowingly receiving" articles obtained by means of a crime or misdemeanor the ordinary case, for example, of reset of stolen goods. But before such a charge can be entertained and still more before charge under the second head can be entertained something more is necessary than the mere allegation that the goods were stolen. The article of the Code goes on to say that those who are guilty of knowingly receiving or having in their possession &c., shall be held and punished as accomplices in such crime or misdemeanour. If the accused, the supposed accomplice, had been charged along with the principal the information would necessarily have contained the ingredients of the crime itself the when, where, and from whom the articles were stolen.

But it can be said that these are less important when the accomplice is charged in absence of the principal? Not only in this case was there nothing beyond the general allegation that the property was "stolen," but it was not even stated from whose possession or custody the article was stolen, and in point of fact it appears from the evidence that the alleged owner did not know the article had been stolen until he saw it in the hands of the Police. Before the accused could "knowingly" receive goods the proceeds of a larceny, the prosecutor is surely bound to set forth the offence of which the accused is

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master,
J. A. ROBERTSON, Esq., Substitute Master,

O. D'EMMEREZ DE CHARMOY, Esq, Registrar.
L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
G. A. RITTER, Esq., Registrar.
JAMES BROWN, Marshall.
J. BOUCHET, Queen's Proctor.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E, ... 1828
Campbell, C. M. 1841
Bazire, E 1858
Leclézio, E J 1858
Pellereau, E. 1860
Martin Moncamp, P. G 1861
Rouillard, L 1861
Chastellier, P. L 1864
Delafaye, V. 1864
Guibert, G. 1864
Newton, W. 1864
Lepoigneur, I. 1864
Jenkins, T. L. 1865
Florent, E 1865
Desmarais, E. 1866
Bazire, E. 1867
Galéa, H. 1867
Lemière H 1868
Avice, H 1868
Beaugeard, P. 1868
Pilot, G. 1868
Vaudagne, E. 1868
Hamon, A. 1869
Lionnet, F. 1870
Ollier, R... 1870
Poulin, F. 1870
Forget, A. 1870
Thibaud, L. A. 1871
Pelte, E. 1871
Desenne, O 1871
Boucherat 1871
Galais, E. 1871
Mathews, L. F. 1872
André, A. 1872

ATTORNIES (actually practising).

Pastor, E 1840
Mercier, J. 1840
Lalandelle, G. 1842
Hewetson, W. 1846
Laurent, E. 1846
Ducray, E. 1848
Hitié, U. 1850
Pignéguy, J. 1850
Pastor, H. 1850
Colin, A J 1851
Pragassa, V 1851
Guibert, J 1853
Finniss, W. 1853
Bouchet, J 1853
Duvivier, Ed. 1853
Robert, F. 1857
Ackroyd, J 1859
Desperles, L 1859
Herchenroder, T. 1860
Laval, V. 1860
Chazal, P. E. de 1860
St-Perne, E. P 1860
Tessier, G 1860
Victor, F. 1860
Mallet, F. 1861
Ducray, V. G. 1861
Gautray, C. 1861
Sicard, N. 1862
Simonet, F. 1863
Pitot, A 1863
Bétuel, A. 1863
Boullé, V. 1863
Rodesse, L. C. 1863
Ritter, G A 1864
Perrot, A 1864
Rohan, A 1864
Gilot, F 1865
Halais, J. 1865
Sauzier, M. 1866
Sauzier, E. 1866
Commarmond, A 1867
Robert, A 1868
Desjardins, E. 1870
Rousset, C. 1870
Wohrnitz, L. 1870
Erny, P. J. A 1871
Rolando, A 1871
St. Pern, L. de 1871
Ganachaud, E. 1871
Ellie, J. 1871
Lastelle, F. 1872
Edwards, E. 1872
Leblanc, W. 1872
Margeot, E. 1872

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 7.

CONTENTS:

EDITED BY E. DE LAFEYRE

BARRISTER AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY,—9, BOURBON STREET

1873.

alleged to have "known" and in which he is to be held as, an accomplice and punished as such. There is no such crime under this article as that of a person receiving or being without justification in possession of articles "well knowing" in a general or moral sense, that the goods were stolen.—The Officers of Police may have the best possible reasons for believing a person to be a resetter of stolen goods, and the mental conclusion come to by them as to the person, may be much the same as the mental conclusion of the suspected person himself as to the goods with which he deals. He may have the best possible reasons for believing that, the articles were stolen, and thus, morally he may very justly be said to be in possession of articles "well knowing" the same to be stolen property!—But the law does not and cannot deal with abstractions, with mental operations apart from the facts which exhibit these outwardly or as in the class with which we are dealing with the facts which convey the knowledge of the crime itself to the receiver, or in regard to which his good faith in obtaining possession may be estimated.

It will be observed that Art. 40 of the Penal Code forms part of a chapter which does not deal with any specific class of crimes—It treats of the "persons punishable, excusable or responsible for crimes or misdemeanours."

The first Article of the Chapter provides that, "accomplices shall be punished with the same kind of punishment, or one of the punishments applicable to such crime or misdemeanour" Art. 40 sets forth that a certain description of persons shall be held to be accomplices in the crime or misdemeanour by which articles have been carried off, abstracted or obtained.

The Article accordingly can only be applicable where these is a particular crime or misdemeanour in which the Accused can be held to be an accomplice and this particular crime or misdemeanour must be as correctly and sufficiently charged against the person whom the prosecutor alleges to be an accomplice, as if he were establishing it against the principial it being well understood that the accomplice may be prosecuted to conviction either in the absence of the principal, or where the principal has neither been tried nor found and even when he may be wholly unknown.

The nature of the evidence in this case shows how necessary it is that the Accused should be informed of the specific crime or misdemeanour in which he is alleged to be accomplice. The stolen article is a copper pump used for the purpose of passing oil from larger casks to the smaller vessels used in the retail trade. It is therefore an article in ordinary use among Traders—The Accused is a trader as well as the party from whom the pump is said to have been stolen.—The Police had searched his premises not because they suspected him of having possession of the pump of Shamamode, the alleged owner, but because they expected to find there the pump of one Martin. The Police were wrong in this supposition, Martin having declared that the pump was not his, and it was only when they were carrying the pump along the street that Shamamode or some one in his employment alleged that the pump was his, and for the first time according to his own statement learned, that his pump had been stolen when he thus discovered it in the hands of the detectives.

The accused set up a defence of a specific kind with the view of showing that he was honestly in possession of the pump and that it was not the property of Shamamode—Upon the mere question of evidence we should of course have been disposed to place the greatest reliance upon the decision of the Magistrate who saw the witnesses and could best judge of the amount of credibility to be given to each. Before however evidence can be allowed to have weight either for or against a prisoner the offence of which he is charged must be clearly and accurately set forth because in this manner only can the evidence be justly weighed or estimated at its proper value,—Now, the Article of the Penal Code founded on, requires as we have seen that the charge shall be so laid against the accused as to set forth specifically the particular crime or misdemeanour, in which he alleged to be an accomplice, and before conviction can follow. either to prove against him the receiving of the stolen articles "knowing" the articles to have been obtain by means of that particular crime or misdemeanour, or to prove possession of the articles so obtained by means of that particular crime or misdemeanour without the accused being able to show any sufficient excuse or justification as to the manner in which they have come into his possession. Taking these principles as our guide and applying them to the case before us, I find that the Information does not sufficiently set forth the crime or misdemeonour in which the accused was to be held as an accomplice and that the conviction, which in itself is egually bad in this respect, must be quashed.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—CONDAMNATION EN VERTU DE L'ART. 301 DU CODE PÉNAL, QUOIQUE LES TÉMOIGNAGES AIENT PROUVÉ QUE LE VOL AVAIT ÉTÉ COMMIS LA NUIT AVEC EFFRACTION,—POUVOIR QU'A LE MAGISTRAT D'INFLIGER UNE PEINE MOINS FORTE AVEC LE CONSENTEMENT DE LA PARTIE QUI POURSUIT,—APPEL REJETÉ.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE,—CONVICTION UNDER ART. 301 OF THE PENAL CODE THOUGH THE EVIDENCE SHOWED THAT THE LARCENY HAD BEEN COMMITTED BY NIGHT AND BREAKING,—RIGHT OF MAGISTRATE TO APPLY A LESSER PENALTY WITH THE CONSENT OF PROSECUTOR,—APPEAL DISMISSED.

—

BAWARASAH ALIAS BAWARASING —Appellant.

versus

THE QUEEN,—Respondent.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT., Chief Judge.

—

T. L. JENKINS,—Of Counsel for Appellant.
A. PITOT,—Attorney for the same.

W. NEWTON,—Of Counsel for the Crown.
J. BOUCHET,—Attorney for the same.

1*st November* 1872.

The appellant a domestic servant was charged in the District Court of Plaines Wilhems with stealing four Turkeys the property of his employer under article 301 of the Penal Code simple theft.

He was convicted and sentenced to one year imprisonment, with labor and costs.

He appealed and *inter alia* pleaded: first. The evidence if it were to be believed, disclosed that the theft was done by night and breaking of the fowl house. It was therefore the duty of the Magistrate to have remitted the man to the Superior Court, and the proceedings ought to be quashed; 2nd the Magistrate has not in terms of §§ 118, 119 of the Ordinance No. 35 of 1852 extended the conviction in the formal shape required by law.

THE COURT.

Taking the second objection in the first place, I shall take care, that the Magistrate be communicated, with on the subject, but under §§ 103 the Ordinance of 1852, any such omission, will not annul the conviction.

As to the first point argued, it is true that larceny by night and with breaking charged under article 306 of the Penal Code of 1838 is a crime not within the jurisdiction of the District Magistrate, (in the octavo edition of the printed Ordinances for 1869, this article 306 is strangely omitted,) but in such a case as the present is was quite within the competency of the Magistrate and the prosecutor and consistent with the jurisprudence of this Court to deal with the case as one of simple theft. It will be noted that, that was the only charge prefered against the prisoner, aggravations, such as appeared incidentally in the course of the proof might be eliminated by the judge and prosecutor if they saw cause, and the lesser case charged viz: simple theft, might be all that was insisted in by the prosecutor with leave of the Court.

This was practically the course followed in the present instance.

Confining myself to the case before me I am of opinion that the conviction was right and ought not to be disturbed, that the appeal must be and is hereby dismissed with costs.

BAIL COURT.

—

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT DES SEYCHELLES,—RÉSILIATION DE LA VENTE,—RESTITUTION DU PRIX,—DOMMAGES.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF SEYCHELLES,—CANCELLATION OF DEED OF SALE,—REFUNDING OF THE MONEY SPENT ON THE PURCHASE,—DAMAGES.

—

Dans toutes les affaires où elles doivent accorder des dommages, les Cours de Justice sont liées par certaines règles qui leur défendent d'accorder des compensations pour des pertes inattendues, forfaites, et indirects.—Art. 1150 *Code Civil. Il n'y a pas de lien direct et immédiat entre les allégations de Loiseau et la faute de d'Offay en vendant un terrain dont les bornes n'étaient pas déterminées ou n'avaient pas été vérifiées. Appel rejeté.*

—

In all cases of awarding damages, Courts of Justice are bound down by certain rules which prohibit them from allowing compensations for any unexpected, incidental and indirect losses—Code Civil Art. 1150 *There is plainly no direct and immediate connection between the allegations of appellant and the fault or misconduct of the respondent in selling land with uncertain and inascertained boundaries.— Appeal dismissed.*

—

LÉOPOLD LOISEAU,—Appellant.

versus.

EUGÈNE D'OFFAY,—Respondant.

—

Before

His Honor SIR CH. FARQUHAR SHAND, KT., Chief Judge.

—

C. M. CAMPBELL,—Of Counsel for Appellant
J. H. ACKROYD,—Attorney for the same.

W. NEWTON,—Of Counsel for Respondent.
A. DE COMARMOND,—Attorney for the same.

1*st November* 1872.

THE COURT.

This was an appeal from a judgment of the District Magistrate of Seychelles, the Plaintiff now Appellant, asked four things in his original plaint, vizt:

1o. That the sale of a plot of ground of the alleged extent of 217 acres, sold with all legal guarantees, by the Defendant to the Plaintiff in virtue of a notarial deed drawn up by and passed in presence of Noël Jousnis, Notary public, duly assisted by competent witnesses, on the 22nd June 1871, should be cancelled and annulled.

2nd. That the defendant should be condemned to refund to plaintiff the sum of one hundred and fifty dollars paid to defendant as appears from the said notarial deed together with interest, thereon at 9 o|o to reckon from the 22nd June 1871.

3rd. That defendant should be condemned to pay to plaintiff the sum of five hundred dollars for damages and prejudice suffered by plaintiff on account of defendants fault. Because amongst other legal reasons in the said notarial deed, defendant sold to plaintiff the said plot of ground of the alleged extent of 217 acres with all the guarantees, and plaintiff has been evicted therefrom by Jules Cauvin & wife, in virtue of a Survey made by Théodore Butler Sworn Land Surveyor with all costs of suit.

After a number of postponements for most of which no reason appears upon the face of the Record, the Court proceeded with the case and disposed of it, by rejecting, no fewer than 7 objections put forward by the defendant, before he pleaded on the merits, his plea was the general issue, the case went on and resulted in a judgment by the Magistrate in favor of the plaintiff in all the heads of his claim, except the last, the demand for damages; costs of suit, were also awarded to the plaintiff by the judgment.

He now appeals and maintains that the damages for which he concluded ought to have been awarded to him.

His own account of the circumstances out of which the alleged damages arose is contained in his deposition when examined before the District Court and is as follows, after being put in possession of the subjects purchased by him from the respondent Mr. D'Offay, vizt, the "Forêt noire," he goes on to say: Mr. D'Offay pointed out to me the boundary line, he pointed out to me the boundary line on the "forêt noire" side of the land, the "forêt noire" belonged to Mr. Jules Cauvin, later on, I had a discussion with Mr. Jules Cauvin, about the boundary line separating his property from mine, I was cutting wood near my boundary line when Mr. Jules Cauvin came and told me that I was cutting wood on his Estate, I was cutting the wood within the boundary line given to me by Mr. D'Offay, when he put me in possession, I told Mr. Cauvin so, Mr. Cauvin, warned me thro' the medium of an usher, that if I continued to cut wood on that spot, he would sue me in damages, I continued to cut

wood on that spot then Mr. Cauvin asked for a survey, the survey was commenced by Mr. Butler assisted by Mr Cauvin, when the boundary line reached the place where Mr D'Offay had given me my boundary line, I objected to its being continued, I objected because if the line had been continued, it would have cut off a portion of my land by the line I mean the "ligne de profondeur," the portion of my land which the line would have cut off was the portion on which I was cutting wood at the time, Mr Cauvin entered before this Court an action in nullity of the opposition, I defended the action, I retained Counsel, the opposition was declared null and the survey ordered to be proceeded with, the survey was then completed, the line to which I objected being followed. The result was the greater portion of my land was taken away by that survey, after the judgment ordering the survey to be continued, but before the survey was completed Mr Jules Chauvin prosecuted me before this Court for larceny of wood; the wood for which I had been prosecuted had been cut, some by me, and some by Mr. D'Offay before me, upon that portion of my land which was taken from me by the survey, I was sentenced to ten days imprisonment with labor and to return to Mr. Cauvin, the wood I had taken. I underwent the ten days imprisonment, I am a trader (hands in his license) I was put to a great deal of expense, on account of the action in nullity brought against me by Cauvin, I had to pay one hundred dollars to Cauvin I paid thirty dollars to my Counsel and I had to pay about thirty dollars in Court for costs, such is the appellant's own account of the matter.

The seller was undoubtedly bound to guarantee, the subjects sold and in case of eviction to pay the damages, but the question here, is what sort of damages, he had to pay, no such damages as are here alleged appear to fall within the rules established by the Code, in cases of eviction and of compensation by damages generally, C. C. Art. 1630, "Lorsque la garantie a été promise, ou qu'il n'a rien été stipulé a ce sujet, si l'acquéreur est *évincé* il a droit de demander contre le vendeur, 1o. la *restitution* du prix, 2o. celle des fruits, *lorsqu'il est obligé de les rendre*, au propriétaire qui l'évince, 3o. les frais faits sur la demande en garantie de l'acheteur et ceux faits par le demandeur *originaire*. 4o. Enfin les dommages et intérêts, ainsi que les frais et loyaux coûts du contrat" but in all cases of awarding damages Courts of Justice are bound down by certain rules which prohibit them from allowing compensation for incidental, unexpected and indirect losses Art. C. C. 1150. "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a *pu prévoir* lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point executée Art, 1151. Dans le cas même ou l'inexécution de la convention résulte, du dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexecution de la convention,

There is no allegation here of bad faith on the part of D'Offay, now what is the real state of the case.—Part of the subjects sold by him to the appellant was found on enquiry, not to be his property, but the appellant instead of falling back upon and relying on his legal rights of guarantee which the seller was bound by the law to give, took up the cudgel in his own defence, got himself involved in serious and costly litigation, exposed himself to a charge and conviction of stealing wood, and to the punishment of imprisonment and the penalties consequent thereupon. All this the appellant brought upon himself. There is plainly no direct and immediate connection between those things and the fault or misconduct of the respondent in selling land with uncertain, and at the time, unascertained boundaries The appeal must therefore be and is hereby dismissed; but looking at all the circumstances without costs.

SUPREME COURT.

—

RAPPORT DU MASTER SUR UN COMPTE, — EXCEPTIONS PRISES PAR LES DEUX PARTIES, —COMPTES RÉFÉRÉS AU MASTER POUR EN FIXER DÉFINITIVEMENT LE MONTANT.

—

MASTER'S REPORT ON ACCOUNT, —EXCEPTIONS TO THE SAME BY BOTH PARTIES,—ACCOUNTS REMITTED TO THE MASTER TO ADJUST, ITS FINAL AMOUNT.

—

BRÉARD,—Plaintiff.

versus

THE CEYLON COMPANY LIMITED, —Defendant.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT., Chief Judge and
His Honor MR. JUSTICE GORRIE, Second Puisne Judge.

L. ROUILLARD,—Of Counsel for the Plaintiff.
M. SAUZIER,—Attorney for the same.

THE HONORABLE E. J. LÉGLÉZIO,—Of Counsel for Defendant.
E. DUVIVIER,—Defendant's Attorney.

26th September 1872.

The Court having heard counsel for plaintiff and defendants, on their several exceptions to the Master's final report in this cause, repel the exceptions of the plaintiff to the aforesaid final Report, and sustain and approve thereof on all the points excepted to. As regards the exceptions of the defendants, the Court,—1o. Repel the first and second exceptions relating to the sums paid to Darné and Ferran, and approve of the final report thereupon; 2o. Sustain the exception as regards the count XIV "freight" on "sugars, guano and provisions," and direct the account to be corrected by charging to the sequestration the freight of the additional sugars ($ 722.00) which the Court ordered to be embraced in the sequestration account; 3o. Repel the exception to the count entitled *supplies of rice pending the sequestration*, and approve of the Master's finding thereupon; 4o. And as to the exception relating to the counts in regard to interest on the sequestration account, the Court approves of the finding of the Master that interest should be allowed on both sides of the account, on the balance advanced or in hand, but direct that the rate on advances be chargeable by the defendants at 12 per cent, and on sums in hand, in favor of the Estate that interest be allowed, at the rate of 9 per cent per annum, to the date of the closing of the account on 19th October 1865. On all other points embraced therein the said final report is sustained and approved including the striking out of the Bill of costs of Hewetson from the sequestration account, which by the judgment of the Court of 7th February 1872 was to be embraced in the final judgment.

The Court having also heard parties on the two points reserved for determination in the said judgment viz: The commission claimed by the sequestrator, and the question of interest on the final balance do order and decide as follows;

1o. As to the commission, the Court having dealt with the final report of the Master on the footing of a strict accounting by the sequestrator and having also ordered by their former judgment extensive corrections of the account, upon the same principle are not disposed to withhold the commission from the sequestrator, which was embraced in the order of sequestration. They accordingly allow the same at the rate of 5 per cent upon the sugars received in town by the sequestrator up to the 5th October 1864 and at the rate of 3 per cent, thereafter, the defendant having on that date placed himself in the hands of the Court, as to the rate of commission to be allowed.

2o. As to the interest on the final balance for the sum admitted by the defendants to be due at the closing of the account, and which was ultimately paid by them to the parties collocated by the Master in the proceedings of adjudication and sale of the Estate Savannah, the Court find no interest due, the amount having been attached in the hands of the defendants on or about the date of the final closing of the account, but on the balance which has been found due, by the defendants on the correction of their accounts in this suit, the Court allow to the plaintiff interest at the rate of nine per cent per annum, from the date of the final closing of the account until paid. Costs of suit in favor of plaintiff. The Court remit to the Master to adjust the final account now due to the plaintiff in terms of this judgment.

BAIL COURT.

—

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT DE LA SAVANNE,—DÉTOURNEMENT,—ART. 333 DU CODE PÉNAL.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF SAVANNE,—EMBEZZLEMENT,—ART. 333 PENAL CODE.

—

L'information doit contenir la description exacte du délit allégué et doit dire aussi au préjudice de qui le détournement a été commis.

L'absence des mots "to the prejudice of whom" rend mauvaise l'information Criminelle.

Jugement infirmé.

—

The information must bear upon its face the exact description of the offence charged, and to whose prejudice the embezzlement has been committed.

The absence of the words "to the prejudice of whom" vitiates a Criminal information.

Conviction quashed.

—

TOUSSAINT,—Appellant.

versus

THE QUEEN,—Respondent.

—

Before

The Honorable Mr. Justice BESTEL, First Puisne Judge.

—

G. GUIBERT,—Of Counsel for Appellant.
J. GUIBERT,—Attorney for the same.

L. Cox Subs. Proc. & Adv. Gen.—Of Counsel for the Crown.
J. BOUBHET,—Attorney for the same.

15*th November* 1872.

This was an appeal from a conviction of the District Magistrate of Savanne, of the 9th September last finding the appellant guilty of having with intent to defraud, unlawfully destroyed a certain sous-seing-privé purporting to be the annullation of a certain lease entrusted to the appellant by one Volny Virginie, on condition that it might be returned to the latter. The appellant was sentenced to two months imprisonment, and to $ 10 fine with costs.

The legality of the conviction was disputed by G. Guibert of Counsel for the appellant on several grounds, and amongst others on that of the insufficiency of the information to warrant the Magistrate in convicting the appellant and sentencing him to the heavy punishment pronounced against him.

In which ever Court a man is called upon to defend himself upon any given charge argued Guibert, it is indispensable that the information or charge preferred, should set forth, upon the face of it an exact description of the offence. That description of the charge in the information, must include in "*expresa* "*terms every ingredient* required by the "statute or a statement of the facts which "constitute the offence, for nothing must be "left to intendment or inference or argument "for helping out the description. For it is "a rule with respect to summary proceedings "before Justices on Penal Statutes, that after "a conviction nothing can be intended, so as "to get rid of any defect in point of form, "for every thing necessary to support the "conviction must appear on the face of the "proceedings, and must be established by "regular proof, or by the admission of the "party of that which is not proved. A direct "and positive charge must be stated against "the defendant, and all the facts themselves "must be stated and not left to be gathered "by inference or intendment, in order that "the Court, may judge, whether or not, they "amount to a legal offence. (Oke's Magl. "Synopsis page 114 and the authorities "quoted.)"

Again not only must all the facts and circumstances which constitute the offence be stated, but they must be stated with *such certainty and precision*, that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly.

"And if any fact or circumstance, which "is a necessary ingredient of the offence be "omitted....Such omission vitiates the in-"dictment, and the defendant may avail "himself of it by demurrer. Motion in arrest "of judnment or writ of error. (Archbold "Criminal pleadings pages 42 and 43, and "in this Island on Appeal.)

Testing the information in this case by the rule above, its insufficiency will at once become apparent.

In order that the embezzlement (or rather détournement) be an offence punishable by Article 333 of our Penal Code, it is required that the détournement should have been committed to the prejudice of the *owners, possessors or détenteurs*, of the subject matter of the embezzlement, (Chauveau Adolphe and Faustin Hélie, Théorie du Code Penal français Article 408, volume 5 page 419) answering to Article 333 of our Penal Code, "cet "Article 408 en définissant l'abus de confian-"ce pose avec clarté les caractères constitu-"tifs du délit, il exige 1o. que le prevenu ait "détourné ou dissipé les objects confiés, 2o. "que ce détournement ait été commis au "préjudice des propriétaires possesseurs ou "détenteurs; 3o. que les objets soient des "effets, deniers, marchandises, billets, quit-"tances, ou tous autres écrits contenant ou "opérant obligation ou décharge—4o. que les "objets aient été remis à titre de louage &a., "ces quatre règles....forment les éléments "*essentiels* du délit, qui ne peut exister que "lorsqu'elles s'appliquent à la fois au même "fait" and at page 427, the same writers go

on to say, " nous arrivons à la deuxième con- " dition prescrite par l'Article 408 pour qu'il " y ait délit ; c'est que le détournement frau- " duleux ait été commis *au préjudice* des " *propriétaires, possesseurs* ou *détenteurs.* Il " résulte en premier lieu de cette règle qu'il " n'y a point de délit lorsqu'il n'y a point de " préjudice causé et que par conséquent la " restitution même après un usage momentané " l'empêche d'exister, il en résulte en second " lieu que ce préjudice n'est lui-même un " élément qu'autant qu'il porte sur les *pro-* " *priétaires, possesseurs ou détenteurs des* " *effets détournés.*"

The authority of the cases upon which the rule has been laid down by Archbold in his Criminal pleadings, clearly shews that the objection I have taken, said Guibert, is still in time although the prisoner has pleaded not guilty to the defective information laid before the Magistrate.

This proposition was denied by the substitute Procureur General, who contended that all objections to any Criminal information for any formal defect should be taken by demurrer or motion to quash such information, (Article 58 Criminal procedure ordinance,) the same may be said of all objections for a substantial defect as shewn by judgment of Bail Court (Saminaden *v.* the Queen, Piston's report 1870 page 100) wherein it is laid down that no objection having been taken to any insufficiency of the information whether as to the form or merits, whatever may be the defects thereof, they were covered by the plea pleaded. In the case of Saminaden, the accused was charged with Larceny simply, the tecknical words " with having fraudulently abstracted, taken and carried away," being omitted. So in this case the prisoner is charged with the offence known in our law (Article 333 Penal Code) under the name of détournement, translated embezzlement in the English version of our Penal Code ; the insufficiency of the information in this case should have been objected to, before pleading to the same, upon the same penalty as in Saminaden's case, that is that whatever may be the defects of the information now before the Court, they were to be cured by the appellant having pleaded over, especially as in Saminaden's case, the evidence taken below clearly establishes the fact of the détournement or embezzlement charged. Guibert in reply, cited in support of his thesis the judgment in the case of " the Queen *v.* Hurrybun Piston's Report 1866 page 146," being a motion in arrest of judgment by Pellereau of Counsel for Hurrybun, upon which motion it was adjudged by the full Bench that the Criminal information was defective for *want of the averments of the ownership* of the money attempted to be stolen. The proceedings had therein been accordingly quashed, and prisoner remanded to next Criminal Session for trial.

JUDGMENT.

The ruling of the Bail Court judge in the case of Saminaden *v.* the Queen has undoubtedly some similarity with the case now before me, but not to the extent contented for by the crown. The charge against Saminaden, was of his having committed larceny, an offence well defined and well known to be the fraudulent abstraction of any thing not belonging to oneself.

The Criminal information in Saminaden's case did not however stop there, but went on averring on the face of it, that the property stolen was that of the master of the vessel on board of which the larceny had been committed, thus shewing the property to be that of another than the party charged.

Not so in the Criminal information now before the Court. It merely charges an embezzlement of a certain instrument or sous-seing privé between Volny Virginie and one Alcide William to the *prejudice* of whom is not stated, to defraud whom is not mentioned. Had it been alleged that the embezzlement had been committed to defraud either Virginie or William, or had it been alleged in the words of the Penal Code Article 333 to have been done to the prejudice of both or either of them, either as owners or possessors or as trustees, the appellant might have come prepared with evidence to rebut the allegation of an embezzlement to the prejudice of either or both of the parties to the sous-seing privé. But in the absence of any such allegation of ownership, or possession or trust, it was not of his power to prove, for instance, that the instrument had been given to him by either or both parties for the very purpose either of destruction or to be handed over to a third party in trust for the two parties to the contract, in which case the act alleged to have been committed by him would be no embezzlement.

The uncertainty complained of in this case did not occur in Saminaden's case as already observed. Further in Saminaden's case we find a party charged saying, he required no further time for his defence and expressing his readiness to go to trial.

Not so in this case. Again the fault found with the conviction in Saminaden's case was that the evidence was insufficient to convict of a Larceny and was, if worth anything, suffi-

cient to warrant only the conclusion of an attempt at larceny. On looking at the evidence to ascertain which of the two offences had been committed, I found the evidence sufficient to warrant the conclusion arrived at by the District Magistrate, and I accordingly affirmed the conclusion in accordance with the practice in such cases.

The uncertainty arising from the absence of the words *to the prejudice* of whom ; necessarily vitiated the Criminal information in the Court below, as the uncertainty of the ownership in Hurrybun's case vitiated the information and proceedings in the higher Criminal Court, I shall and do therefore allow this appeal and accordingly quash the conviction appealed from.

BAIL COURT.

—

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT DE FLACQ,—TRESPASS,—DOMMAGES.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF FLACQ, — TRESPASS, — DAMAGES.

—

Action en dommages intentée contre l'Administrateur d'une propriété, Intervention du propriétaire, admission de sa responsabilité La Cour ordonne que le propriétaire soit mis au lieu et place de l'administrateur. Affaire référée au Magistract de District.

—

Action in damages brought against the Manager of an Estate. Intervention of the proprietor, admission of his responsibility, the Court directs the owner to be put in cause in lieu and place of the Manager. Case referred to the District Magistrate.

—

VEEREN,—Appellant.

versus

PILOT,—Respondent.

—

Before

Sir CHARLES FARQUHAR SHAND, KT.,
Chief Judge.

—

T. L. JENKINS,—Of Counsel for Appellant.
P. F. LAFFELLE,—Attorney for the same.

L. ROUILLARD,—Of Counsel for Respondent.
V. BOULLÉ,—Attorney for the same.

—

15*th November* 1872.

In this case Veeren in the district of Flacq sued Pilot the manager of the Estate *Belle Rose* for trespass and destruction of trees and vegetables on his ground claiming $ 200, as renumeration for his alleged loss and damage.

The defendant was examined as a witness in the Court below and deponed that he acted in the matter entirely under the orders of the proprietor of the Estate. The plaintiff then moved that the case should be postponed that he might have an opportunity of putting the owner in the case. The Court refused the motion and the plaintiff preferring an adverse judgment to a non suit, the Magistrate gave judgment for defendant with costs.

Veeren appealed. At the hearing in the Bail Court. Rouillard on behalf of the proprietors of the Estate *Belle Rose* stated that he was ready to undertake the whole responsibility as whatever Pilot might have done by his orders as the owner of the Estate.

THE COURT.

The position of the case is now materially changed, if any wrong was done to the plaintiff, the owner of the estate has now come forward and admit his responsibility I shall therefore order that he stand defendant in the case in room and place of Mr. Pilot, who is put out of the case. I give no opinion in the present state of the case on the plaintiff's right to sue Pilot in the first instance. The case is remitted to the District Magistrate that it may be proceeded with and decided. All questions of costs whether in this Court or the District Court reserved for the decision of the Magistrate after the case has been fully inquired into and decided.

SUPREME COURT.

—

OBJECTIONS A UN RAPPORT DU MASTER SUR LES COMPTES D'UNE SOCIÉTÉ.

—

REPORT OF THE MASTER ON THE ACCOUNTS OF A PARTNERSHIP.—OBJECTIONS TO THE SAME.

—

Quand l'affaire a été référée par la Cour au Master pour établir les comptes de la société, le plaignant proposa de prouver par témoins que Buttié s'était engagé à payer la dette d'Esnaud. Le Master a, avec raison, refusé cette preuve, le moment de produire des documents et de soumettre des preuves orales ou autres, était, quand l'affaire a été entendue, pour la première fois, devant la Cour Suprême.

—

When the case was referred by the Court to the Master to draw the accounts of the partnership, it was proposed by plaintiff to prove by oral evidence that Buttié had undertaken to pay the debt of Esnaud. The Master rightly refused to admit such proof, the time for producing documents or tendering any evidence oral or otherwise was, when the case was first heard before the Supreme Court.

—

OLLIVIER,—Appellant.

versus

BUTTIÉ & ORS.—Respondents.

—

Before

His Honor Mr. Justice BESTEL, First Puisne Judge and
The Hon. J. GORRIE, 2nd Puisne Judge.

—

E. PELLEREAU,—Of Counsel for Appellant.
J. MERCIER,—Attorney for the same.

HON. E. J. LÉCLÉZIO,— } Of Counsel for
P. L. CHASTELLIER,— } Respondents.
A. J. COLIN,—Attorney for the same.

—

15th November 1872.

This case comes before the Court on certain objections to a report of the Master to whom the Court had remitted the cause on the 8th of December last.

The plaintiff sues for payment of two sums, the one amounting to $ 998, and the other to $ 3316.50, said to be due to Paul Rochecouste in virtue of a contract of Partnership between Buttié, Paul and Charles Rochecouste, and Arlanda.

The first sum is alleged to be due, because of Buttié having paid in less than his proper share of the capital, and the latter sum because of an excess alleged to have been paid by the Rochecoustes and which Buttié and Arlanda had specially undertaken to repay at the end of the partnership.

The Master, on the reference from the Court, investigated the position of affairs between these parties, and found that with regard to the first sum it would be due, if due at all, to the partnership, and not to the individual partners or their heirs and assignees. He held, further, that the balance due by Buttié depended upon the proportion between the value of his property, free of debts, and the amount of his share of the partnership capital, and that the partnership had undertaken, but failed to pay these debts, and that the two obligations being reciprocal, the non execution of the one carried with it the annullation of the other. (As regards the second sum claimed, the Master found that the obligation undertaken by Buttié and Arlanda to pay it, had been undertaken on the assumption that the lands of Charles and Paul Rochecouste were free from debts as declared by them, and that instead of being so, they were encumbered with mortgages and especially with the mortgage of Jean Esnaud, who prosecuted the judicial sale of *Mount Eulalia*, the partnership property, which brought the partnership to an end. The Master, accordingly, found that the obligation undertaken in the contract of partnership was without any cause, and was null to all intents and purposes.

Upon the draft of this report being communicated to the parties, the plaintiff Olivier asked to prove by oral evidence that Buttié had undertaken to pay the debt of Esnaud, and they allege that they tendered a Schedule of Buttié's debts upon which the contract of partnership proceeded in further proof of this allegation. The evidence tendered was objected to by the defendants, and the Master ruled that the oral evidence could not be received, and maintained his draft report as definitive. Whereupon, the objections were

taken to the report, upon which the case has again come before the Supreme Court and the parties have been fully heard.

The objections do not appear to us well founded. The time for producing documents, or tendering any evidence, oral or otherwise, which the parties might have thought necessary was when the case first came for hearing in the Supreme Court, and certainly before the Master had considered the whole question and framed his draft report. At all events, even upon the showing of the objectors themselves, that the claim of Esnaud was amongst the debts of Buttié, which the partnership undertook to pay, all that they propose to substantiate would only go to increase the amount paid in by Buttié to the partnership, and thus to upset all the calculations, upon which their claims against him are founded.

As to the second claim, it is clear that it could only be enforced on the supposition that the contract of partnership had been acted upon in the manner and to the extent contemplated, when the obligation of Buttié and Arlanda was undertaken, and this, irrespective altogether of the fact whether the Rochecoustes brought into the partnership the lands free of debts or not.

Buttié and Arlanda undertook to pay the sum " at the expiration of the partnership ", which was to continue for five years from the first August 1842. But the subsequent proceedings abundantly show that the Master was justified in holding that the Rochecoustes had not brought lands free of debt into the partnership, the partnership property having been levied for the debt of Esnaud which was primarily, at all events, due by them since he held a mortgage over their property; and by the ordre of " Mont Eulalia " various mortgages and other claims were ranked on the special lands which the Rochecoustes had brought into the concern. In short, the estimate of partnership capital brought in by each of the partners, and the intention of the parties when they undertook the relative obligations to each other set forth, in the contract of partnership itself, were all upset by the action taken by the creditors in levying the partnership property, and the partnership itself was brought to a premature end.

In this state of affairs, it would be clearly unjust to look at the obligations undertaken by the contract of partnership by the partners *inter se*, without considering the intention, of parties, and the whole circumstances of the case, and looking at that intention and those circumstances, we find the report of the Master well founded and disallow the exceptions of Olivier brought against the said report,—with costs.

SUPREME COURT.

—

HOMOLOGATION D'UN ACTE DE PARTAGE,—FRAIS EXCESSIFS,—LA COUR N'ACCORDE A L'AVOUÉ ET AU NOTAIRE QUE LEURS DÉBOURS ET LA MOITIÉ DE LEURS HONORAIRES, — AUCUN FRAIS POUR L'HOMOLOGATION.

—

HOMOLOGATION OF A DEED OF PARTITION,—EXCESSIVE COSTS, — ACTUAL DISBURSEMENTS AND ONE HALF OF THE PROFESSIONAL CHARGES ONLY ALLOWED TO THE NOTARY AND ATTORNEY,—NO COSTS FOR HOMOLOGATION.

—

COINDREAU,—Plaintiff.

versus

LAUTIER & ors.—Defendants.

—

Before

His Honor SIR CH. FARQUHAR SHAND KT., Chief Judge and
His Honor MR. JUSTICE GORRIE, 2nd Puisne Judge.

—

P.L. CHASTELLIER,—Of Counsel for plaintiffs.
E. SAUZIER,—Attorney for the same.

—

22nd November 1873.

25th October 1870. The Court refuses to homologate this deed of partition unless the Notaries and Attornies engaged in the case consent that their costs be reduced by one half.

The Court, considering the said costs to be excessive, in presence of the small amount to be divided.

22nd November 1872. No motion having been made in Court as to this matter, and the heirs having come to Chambers asking that their shares may be alloted to them, the Court homologate the deed, with this exception, that the Notary and the Attorney

are to be allowed their actual disbursements and half of their professional charges, without further costs for homologation or amendment. The amounts, due to the heirs, to be paid immediately.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

—

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE.

—

L'affaire est référée au Magistract de District pour permettre au Conseil Légal de l'Appellant d'examiner un témoin qui avait d'abord été examiné en son absence. Les frais seront accordés par le Magistrat.

—

Case referred back to the District Magistrate, in order to give to Appellant's legal adviser the opportunity of examining one witness who was, at first, examined in absence of Appellant's legal adviser. Costs to be awarded by the Magistrate.

—

ASSEN,—Appellant.

versus

THE QUEEN,—Respondent.

—

Before

His Honor Sir CH. FARQUHAR SHAND, KT., Chief Judge.

—

E. BAZIRE,—Of Counsel for Appellant.
J. H. ACKROYD,—Attorney for the same.

L. COX, Act. Subs. Proc. & Adv. Gen.—Of Counsel for the Crown.
J. BOUCHET,—Attorney for the same.

—

***22nd November* 1872.**

THE COURT.

It appears to me that this case has got out of shape. It seems that a witness was examined in the absence of his, the appellant's legal adviser, who had attended the case throughout, and he says he was not aware of the fact in time to state it in his reasons of appeal. It is to be noted that the evidence of the witness in question is founded upon by the respondent as important.

In the circumstances occurring here, I shall remit the case to the District Magistrate to recall his judgment and delete the evidence of Mr. Florigny, the witness referred to, from the Record; farther to fix a day for Mr. Florigny to go to and inspect the premises, due notice of the day and hour to be given to parties that they may attend with their legal advisers, if they so wish, Mr. Florigny there after to be examined in Court in presence of the parties and their legal advisers if they so desire, the case to be, thereafter, decided by the Magistrate. All questions of costs both in this Court and in the Court below reserved for the determination of the Magistrate, when the case is decided.

BAIL COURT.

—

The Job-Contractor must be designated in the Contract.—No men can be indentured to a Job-Contractor, without, he, having a licence,—No men can be engaged to the same beyond the period of the licence,—Special form of Contract must be used to be able to transfer indentured men from one estate to another, without their consent—Contracts of labourers with Job-Contractors must be specific to be general—The consent to be given before changing estates by Indians, indentured to Job Contractors, is not necessary when engaged under a general guarantee. Contracts must be signed and not stamped by the Magistrate.—Contracts must be signed or marked by the contracting parties themselves.

We have no certainty that a stamp such as that used, has been used by the Stipendiary Magistrate himself, and the only possible explanation of resorting to such a device would be, that the stamp was to be used by others:—at all events whether used by himself or not, the method is not according to law and I cannot regard any document as a Contract of Service with regard to

which, this essential legal provision of the signature of the Stipendiary Magistrate has not been complied with; either in the mode provided for by the order in Council, or any subsequent law.

The regulation that a Job-Contractor cannot engage laborers for any period extending beyond the term of his license is quite precise.

—

Le nom de l'entrepreneur doit être inséré dans tout Contrat de Service.—Un entrepreneur ne peut engager des hommes sans avoir une patente,—Il ne peut non plus les engager au delà de l'époque mentionnée dans sa patente —Il doit se servir d'une forme d'engagement spéciale pour pouvoir transférer des Indiens, sans leur consentement, d'une propriété à une autre. Les Contrats de Service faits entre entrepreneur et laboureur doivent être spécifiques pour être généraux, —Il n'est pas nécessaire avant de transférer des Indiens, engagés à un entrepreneur, d'une propriété à une autre, qu'ils donnent leur consentement devant un Magistrat, pourvu qu'ils aient été engagés sous une caution générale,—Les Contrats de Service doivent être signés et non timbrés par le Magistrat,—Les parties contractantes doivent signer le Contrat ou y apposer leurs marques eux-mêmes en présence du Magistrat.

Rien ne prouve que le timbre dont on s'est servi dans cette affaire ait été employé par le Magistrat Stipendiaire, et la seule raison valable que l'on puisse donner pour avoir employé un tel expédient, est que ce timbre devait être employé par d'autres personnes; dans tous les cas soit que ce timbre ait été employé par le Magistrat lui-même ou par toute autre personne, le fait n'est pas légal. Je ne puis considérer un document comme étant un Contrat de Service, si la partie la plus essentielle de ce Contrat (la signature du Magistrat) n'est pas écrite de sa main; forme indiquée par l'ordre en Conseil et toute autre loi subséquente.

Le réglement, qui veut qu'un entrepreneur ne puisse engager des Indiens pour plus de temps que celui fixé dans sa patente est formel.

—

DOOLUB,—Appellant.

versus

SEEDAM & OTHERS,—Respondents.

—

Before

His Honor MR. JUSTICE GORRIE, Second Puisne Judge.

—

W. NEWTON,—Of Counsel for Appellant.
J. H. ACKROYD,—Attorney for the same.

L. Cox Acting Subs. Pro & Adv. Gen.—Of Counsel for Respondents.
J. BOUCHER,—Attorney for the same.

—

27th November 1872.

This is an appeal by Doolub, a Job Contractor against Seedam and eighty one other Indian laborers in order to obtain a review of a Judgment of Mr. de Boucherville, then Acting Stipendiary Magistrate of Grand Port, by which the engagements of these men, with the exception of twelve, were cancelled, and the appellant fined £ 5 with costs for sending the men to work as Job Contractor's laborers on certain Estates, without having complied with the requirements of the law. One of the reasons of appeal is that the Acting Magistrate who had legally and properly begun to try the case, and heard the evidence, was incompetent to pronounce judgment upon it, because a successor was appointed to him in the District before judgment was given. I do not think this can be substained.

The chief ground of appeal really was that the men being Job-Contractor's laborers, who were not engaged for any special Estate, it was not necessary that they should give any consent before the Stipendiary Magistrate before being removed from one Estate to another, and that the Magistrate had erroneously held that such consent was necessary.

In the course of the discussion the certified copies of the contracts of service to be found in the proceedings were referred to, and the discussion turned a good deal upon the meaning and effect of a certain clause, partially printed and partially in blank, in the ordinary printed form provided by Government.

I, accordingly, thought it better to require the present Acting Stipendiary Magistrate to remit to me the originals of the contracts themselves. The Magistrate, Mr. Caldwell, kindly attended me in Chambers and we compared together the numerous copies of contracts in the dossier with the originals.

I, take as an example, one of the contracts dated 19th April 1870, which contains the

names of the following laborers, included in the case, viz: Bundowah 150619, Boodun 94777, Lutchmadoo 156081, Kistnen 264103, Sungkur 100976 and Sadialoo 179365. Since that date, the law as to contracts has not been changed except by the recent Ordinance as to signed copies; and testing the contract before us by the various enactments and regulations and the facts as given to the Court by the Counsel for the employer, the appellant, what do we find?

It is nowhere stated in the contract that these men were engaged to a Job Contractor. The form used is the ordinary form, for the engagement of labourers on Estates, but the printed words "*the Estate*" in the expression "contract of service for the Estate" are struck through with the pen leaving the words to run thus, "contract of service for Mare "d'Albert and Pont Colville in the District "of Grand Port." The employer is designed as Doolub, of Mare d'Albert. In point of fact, there is an Estate, called Mare d'Albert, but it does not belong to Doolub, and the Mare d'Albert and Pont Colville mentioned here, are, as explained by Doolub's Counsel, localities, where the camps of his laborers are situated and where he has a certain number of acres of ground.

The clause of the ordinary contract which makes it null and void if the Immigrant shall be employed on any other Estate, than that for which he is engaged, without his consent being first given in presence of the Stipendiary Magistrate, is left blank; that is to say, the clause which is partially printed is not completed by the insertion of the names of the employer, the Estate and the District. Another clause which has no meaning when Immigrants are engaged to a Job-Contractor, that viz: which binds the Immigrants, to serve the Assignee or heir to the Estate, is not deleted, and stands as part of the contract. The argument of the appellant's counsel on this branch of the case was, that the contract not having set forth that it was for any special Estate, and the clause which prevented the transference of the men, from one Estate to another, without their consent given before the Stipendiary Magistrate, having been left blank, and followed as the contract has been by the actual working of the men for long periods on various estates without complaint; it follows that the contract, was regarded by the Magistrate and the men alike, at the time it was made, as a Job-Contractor's contract, under which the consent of the men was not necessary every time the Estate was changed, provided the requisite guarantees, required by the law, were given for payment of wages.

The Supreme Court had lately the opportunity of considering in the case of *certiorari*, the Crown versus Bax and Leriche, the point where the contract was written out as for a special Estate, and the men had been transferred to other properties without their consent having been given before the Stipendiary Magistrate; and there we quashed the judgment of the Magistrate which ordered the men to return to their work, on an Estate different from that mentioned in the contract, their services, not having been otherwise legally transferred.

Here, as the contract bears to be not for any special Estate, but for localities only, and the clause as to transference without consent being left in blank, the point involved is different, but the principle of that decision clearly was, that there must first be a legal contract, and that the contract should be regarded as the law of parties to the obligation.

If, as the appellant contends, it was the intention of parties to agree to serve a Job Contractor, whose business it is to transfer the men from one Estate to another, as he may from time be himself employed, the regulations issued by the Government, following upon Ordinance 31 of 1867, have provided a special form of contract applicable to such circumstances; it will be found in the Appendix to the regulations issued on 8th September 1869, Schedule A A. That form takes care to provide that, when the employer is a Job Contractor, he shall be so *designed*. The clauses regarding the transference of the laborers and binding them to serve the heirs or Assignees of the actual proprietor are not inserted, but there is a clause which provides that the contract shall be null and void if the men are employed out of their Distaict.

The designation of the employer as a Job Contractor, when he is such, is not merely inserted for the sake of accuracy. There are, in such cases, certain modifications of the law which require to be attended to in the framing of the contract.

Under § 52 of the regulations already referred to, no person is to be allowed to engage laborers as a Job-Contractor, unless he produce a license, under Ordinance 31 of 1865; nor shall any Job-Contractor be allowed to engage laborers for any period extending beyond the term of his license. Under the ordinary laws of the Colony, the license requires to be renewed annually, and I find that at the close of the case, before the Stipendiary Magistrate, a license was produced by the appellant for the year ending 30th July 1873.

I find also, however, that in the contract I have selected, dated 19th April 1870, the men are engaged for five years at a fixed rate of wages, some of them at 12s. a month.

These men, be it remarked, are not new Immigrants, but laborers who had already completed their industrial residence.

Evidently, the contract is thus different from the form provided by the Government Regulations for a Job-Contractor who wishes to employ men on various Estates; and the term for which the men are engaged is beyond the period of the Job-Contractor's license. Moreover, the Government Regulation § 53 requires in the case of all Job-Contractors who may desire to engage laborers to work on any Estate, in a given District, a security in the form of Schedule B. B; and no such security has been furnished by the appellant, although he has furnished in certain cases special guarantees by the owners of the Estates on which the men worked, which are required by law in addition to the general security.

The Judgment of the Stipendiary Magistrate mentions both these circumstances of the contracts being beyond the period of the license, and the absence of the general guarantee; but the judgment mainly proceeded upon the employment of the men as Job-Contractors laborers, while the contracts were different.

Certainly if we look upon the contracts as for the special properties of the appellant at Mare d'Albert and Pont Colville, assuming the Magistrate to have justly appreciated the evidence as to the fact of the men being employed elsewhere, (and on this point I would not be disposed to take a contrary view) a breach of contract could be established, whether the special clause founded on by the appellant were properly filled up or not. A contract to work with Doolub at Mare d'Albert is not a contract to work with Pierrot at *Eau Bleu*, or Pougnet at *New Grove*, nor with *Doolub* himself at any other places than those named.

The Magistrate, however, has made a distinction between the cases of the complainants, and he has found that twelve of them; Ramchurn, Calleemootoo, Viathadoo, Boothun, Peerbeethradoo, Mootoosamy, Ramsamy, Seedam, Kistnen and Samboo, had not been sent by the appellant to work on other Estates, and has ordered them to complete their engagements with Doolub.

Three of these appear to be embraced within the contract I have selected, viz: Boodhun, 94,777 Sadialoo 179,365 and Kistnen 264,103.

In examining the original contract, I find it is not signed by the Stipendiary Magistrate, but his name is affixed by means of a stamp in red paint or red ink; and the marks which profess to be those of the men who thus bound themselves for five years, have, evidently, been all made by the same hand, and are not the marks of the men themselves.

The law requires that contracts of service shall be signed by the Stipendiary Magistrate and to be signed or marked by the contracting parties.

We had this point under consideration in the case of Ramghan *versus* Poulin (6th November 1871) and the principles, there set forth, are applicable here. We have no certainty that a stamp such as that used, has been used by the Stipendiary Magistrate himself, and the only possible explanation of resorting to such a device would be, that the stamp was to be used by others. At all events, whether used by himself or not, the method is not according to law; and I cannot regard any document as a contract of service with regard to which this essential legal provision of the signature of the Stipendiary Magistrate has not been complied with, either in the mode provided for by the order in Council or any subsequent law.

The question involved is not the liability of the person using the stamp to fulfil an obligation professedly undertaken by the contract. In such a case it might well be that the person using the stamp, and intending thereby at the time to adhibit his name to the obligation, might be held bound by his own act, or that the party who had undertaken to pay or perform something on the other side should not be allowed to free himself by such an objection, not stated at the time.

Here, the signature of the Magistrate is required in attestation of the fact that the contract was entered into by the Immigrants voluntarily, and with a clear understanding of its meaning and effect; and the importance of attending to this legal requirement is not lessened when contracts may be made for five years in place of the one year permitted by the order in Council of 1838.

As a farther illustration of the importance of the Magistrate's signature, I may add that in the contract before me I find the small but important word *or* inserted between the lines of the printed contract, so as to alter the contemplated Government rations from a certain amount of Dholl and salt fish per week to an alternative amount of either. Whether this may be legal or not otherwise, it is at least

essential to know whether the parties to the contract voluntarily consented to this alteration. A stamped name of a Stipendiary Magistrate, which may, and in these cases I believe, was imprinted by a Clerk, does not convey any assurance such as the order in Council contemplated by requiring the signature of the Magistrate—that the parties did know the meaning and accepted the terms of the contract.

The contracts of Seedam 265,455 and Ramsamy 143,128 have been also stamped not signed. In the case of Calleemootoo whose contract is dated 4th May 1870, there is neither signature of the Stipendiary Magistrate nor the stamp; and this person, not an Immigrant, but a passenger, seems to have been engaged for three years to the Job-Contractor as a goldsmith. Ramchurn 831,378, also excepted by the Magistrate, was engaged by contract dated 12th February 1872, which is signed by the Magistrate, and is in all respects regular as a contract for the Estate of Mare d'Albert and Pont Colville, and the clause prohibiting the Immigrant being employed on any other Estate without his consent having been given before the Stipendiary Magistrate is filled in, the word "Estate" in the clause having the word *places* written across. There is also a Ramsamy 128,021, engaged under the same contract, but I have no means of knowing whether the Ramsamy Collen, excepted by the Stipendiary Magistrate, was Ramsamy 143,128 already mentioned or this Ramsamy 128,021. The contract just referred to being thus regular as a contract for a special locality, and the Magistrate having held that Ramchurn had not been employed away from the localities, appears to be valid, so far as the chief ground of complaint is concerned. But, unfortunately, the contract is for five years and the license of Doolub as a Job-Contractor for one year has been put in process. The regulation that a Job-Contractor cannot engage laborers for any period extending beyond the term of his license is quite precise. The Stipendiary Magistrate has overlooked this ground in the case of Ramchurn, although it is one of those on which he apparently based his decision.

The contract of Ramsamy 128,021 falls under this category, should he be the Ramsamy Collen excepted in the judgment of the Magistrate.

Peerabuthrodoo, who, I suppose, is the Veerabuthrodoo of the judgment, was engaged, under a contract signed by the Magistrate, for four years, dated 15th June 1868 (the marks of the laborers having, however, been all made by the same hand, apparently that of the Magistrate) so that his contract expired on the 14th of June 1872, several months, before the Magistrate gave his judgment.

If there is no other new contract, he can only be regarded as a monthly laborer.

This is the only laborer in the case, so far as I can see, whose contract is dated before the Government regulation, relating to the period for which Job-Contractors may engage men, was enacted and before the period when Doolub admits having acted as Job-Contractor.

I cannot find, among the papers, the contract of Veerthadoo, also excepted by the Magistrate, and who in a list of the complainants is entered as being No. 169,633.

It is all the more necessary that the Stipendiary Magistrate should have the contract under his eyes, as I observe it stated that Varthadoo is constantly a deserter. It may be as well that the Magistrate should be assured of the legality of the contract, before any punishment is awarded or continued against him on this ground.

The position of the case accordingly seems to be this, that while the Magistrate's judgment is sound in the application of the facts, and the law he has applied to those facts, so far as it goes, there existed a nullity in almost all of the contracts which appears on their face and with which he has not dealt; but which would have been sufficient to prevent the claim of the appellant being listened to, to have the contracts maintained, even had the Court taken an adverse view from the Magistrate of the facts or the law to be applied to those facts.

So far, my judgment is adverse to the appellant, but another consideration presents itself which is in his favour. If these contracts are not signed by the Stipendiary Magistrate, if they are contracts with a Job-Contractor for periods longer than the law contemplates, if no general guarantee has been given as provided by the law, and the form of contract is different from what the law requires for men in that capacity; in short, if there are nullities on the face of them, sufficient to cause them to be set aside on the demand of the laborers, can the contracts be held good against the employer, so as to warrant the fine of £5 with costs pronounced against him by the Magistrate for breach of such contracts? That appears to me to be unjust, and looking, as I do, at the irregularities and nullities in these contracts, as arising from the absence of due care and attention to the law on the part of the Magistrate, I recall the judgment appealed

against in so far as it inflicts such a fine with costs.

I affirm the discharge from their engage ments of the respondents, whose contracts have been cancelled by the Magistrate, both on the grounds on which he has proceeded, and on the additional ground that the contracts are legally null in the respects above set forth.

In the case of the twelve men excepted from the judgment of the Magistrate, who have not appealed, I leave it to the Procureur General to adopt such steps it may appear to him proper in the circumstances. No costs on the appeal.

SUPREME COURT.

—

Certiorari,—Annulation of Contracts of Indian laborers.—Legal authority to sign the same as mandatory.—Contracts may be legally passed between third party acting on behalf of employer and labourers, with power of attorney granted by the mandatory of the employer.—Right of the Supreme Court to revise Judgments of Stipendiary Magistrates by way of certiorari.

Looking at what was really done and what has followed between the parties, any attempt to set aside this Contract of labour would be futile. Not only execution has followed on the agreement for many months, work has been done, wages paid, and rations supplied all along, but in the plaint submitted by the labourers, they founded on the Contract as a legal document and asked payment of certain sums of wages which they alleged had been wrongfully withheld from them. We cannot set aside the Contracts in such circumstances. Judgment quashed.

—

Certiorari, — Annulation de Contrats entre maitres et serviteurs,—Pouvoir donné à un mandataire de signer des Contrats de Service. —Un Contrat peut être légalement fait par un tiers agissant au nom d'un employeur d'Indiens, pourvu qu'un pouvoir lui ait été donné par le mandataire de l'employeur.— Droit de la Cour Suprême de réviser les jugements des Magistrats Stipendiaires par voie de Certiorari.

Prenant en considération ce qui a été fait dans cette affaire et ce qui a réellement eu lieu, entre les parties, toute tentative de notre part d'annuler le présent Contract de Service serait absurde ; non seulement ce Contrat a reçu son application pendant plusieurs mois, par le fait que les Indiens ont eu leurs gages et leurs rations pendant cette époque, mais dans leur plainte même ils se sont basés sur ce Contrat, comme étant parfaitement valable, pour demander le paiement de leurs gages qu'ils alléguaient avoir été illégalement retenus. Nous ne pouvons, en présence de tels faits, annuler le présent Contrat de Service et nous infirmons en conséquence le jugement du Magistrat Stipendiaire.

—

BACHOO & Others,—Plaintiffs.

versus

Roger de BELLOGUET,—Defendant.

—

Before

His Honor Sir Ch. Farquhar Shand, Kt., Chief Judge and
His Honor Mr. Justice Bestel, First Puisne Judge.

—

G. Daly, Esquire,—Stipendiary Magistrate in person

W. Newton,—Of Counsel for Defendant.
J. H. Ackroyd,—Attorney for the same.

—

11*th December* 1872.

This was an application for a writ of *certiorari* to bring up a judgment of the Stipendiary Magistrate of the District of Savanne, dated 4th November last, by which he had, on the complaint of one Bachoo, and six other Indian laborers, annulled the contract purporting to have been entered into, between them and one Léon Guéry, said to represent the proprietor of the Estate *Bel Ombre* in that District. The ground for rupture of the contracts alleged, was ; that Guéry had no legal authority for what he did, in entering into the engagements.

When the matter was moved in Court, the Magistrate of the District attended in person with all the papers connected with the case, and it was agreed without farther formalities, to go at once into the merits of the questions raised, the Magistrate supporting his own views of the case.

SUPREME COURT OF MAURITIUS.

His Honor Sir C FARQUHAR SHAND, KNT., L.L D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master,
J. A. ROBERTSON, Esq., Substitute Master,

O D'EMMEREZ DE CHARMOY, Esq, Registrar.
L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
G. A. RITTER, Esq., Registrar.
JAMES BROWN, Marshall.
J. BOUCHET, Queen's Proctor.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E,	1828	Jenkins, T. L.	1865	Ollier, R.	1870
Campbell, C. M.	1841	Florent, E	1865	Poulin, F.	1870
Bazire, E	1858	Desmarais, E.	1866	Forget, A.	1870
Leclézio, E J	1858	Bazire, E.	1867	Thibaud, L. A.	1871
Pellereau, E.	1860	Galéa, H.	1867	Pelte, E.	1871
Martin Moncamp, P. G	1861	Lemière H	1868	Desenne, O	1871
Rouillard, L	1861	Avice, H	1868	Boucherat	1871
Chastellier, P. L	1864	Beaugeard, P.	1868	Galais, E.	1871
Delafaye, V.	1864	Pilot, G.	1868	Mathews, L. F.	1872
Guibert, G.	1864	Vaudagne, E.	1868	André, A.	1872
Newton, W.	1864	Hamon, A.	1869	Pignéguy, J	1873
Lepoigneur, I.	1864	Lionnet, F.	1870	Sauzier, T	1873

ATTORNIES (actually practising).

Pastor, E	1840	Laval, V.	1860	Sauzier, M.	1866
Mercier, J.	1840	Chazal, P. E. de	1860	Sauzier, E.	1866
Lalandelle, G.	1842	St-Perne E. P	1860	Commarmond, A	1867
Hewetson, W.	1846	Tessier, G	1860	Robert, A.	1868
Laurent, E.	1846	Victor, F.	1860	Desjardins, E.	1870
Ducray, E.	1848	Mallet, F.	1861	Rousset, C.	1870
Hitié, U.	1850	Ducray, V. G.	1861	Wohrnitz, L.	1870
Pignéguy, J.	1850	Gautray, C.	1861	Erny, P. J. A	1871
Pastor, H.	1850	Sicard, N.	1862	Rolando, A	1871
Colin, A J	1851	Simonet, F.	1863	St. Pern, L. de	1871
Pragassa, V	1851	Pitot, A	1863	Ganachaud, E.	1871
Guibert, J	1853	Bétuel, A.	1863	Ellie, J.	1871
Finniss, W.	1853	Boullé, V.	1863	Lastelle, F.	1872
Bouchet, J	1853	Rodesse, L. C.	1863	Edwards, E.	1872
Duvivier, Ed.	1853	Ritter, G A	1864	Leblanc, W.	1872
Robert, F.	1857	Perrot, A	1864	Margeot, E.	1872
Ackroyd, J	1859	Rohan, A	1864	Newton, G	1873
Desperles, L	1859	Gilot, F	1865	Arnal, C	1873
Herchenroder, T.	1860	Halais, J.	1865		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

L'ILE MAURICE.

1872

PART 8.

CONTENTS:

EDITED BY E. DE LAPEYRE

BARRISTER AT LAW.

MAURITIUS:

PRINTED BY E. DUPUY,—9, BOURBON STREET.

1873.

The facts were the following : on the 19th February 1867 Mr. R. de Belloguet the proprietor of the estate, *Bel Ombre*, had granted a written mandate to Joseph Charron, the chief employé on the estate ; *inter alia*, to enter into engagements with laborers in presence of the Stipendiary Magistrate of the District. No objection was taken to this authority, which was duly deposited with the Magistrate, on the 5th Marth 1870. Charron granted the following written mandate to Léon Guéry, one of the employés under him on the estate.

" Je soussigné, Joseph Charron administra-
" teur du bien de *Bel Ombre* Savanne, agissant
" pour M. R. de Belloguet propriétaire, sui-
" vant pouvoirs déposés aux différentes cours
" de Justice du quartier de la Savanne—donne
" par ces présentes pouvoir à M. Léon Guéry
" de se présenter en mon nom devant Mes-
" sieurs les Magistrats de District, du dit
" quartier, pour porter ou répondre à toute
" plainte concernant les laboureurs et emplo-
" yés, employés par la propriété *Bel Ombre*.

" De signer tout contract de service pour
" la dite propriété.

" De porter, ou répondre à toute plainte
" concernant la dite propriété."

Signed : J. CHARRON.

Bel Ombre 5 Mars 1870.

In the year 1870, at different dates, Guéry entered into contracts of service with the complainers respectively ; for periods of service of 28 and 30 months. They went upon the estate, and continued to labor till the 3rd October 1872, when they presented an application to the Magistrate setting forth ; that 2 shillings sterling had been illegally deducted from the wages of each of them for the last four months, therefore claiming restitution of the sums, so deducted, and asking cancellation of their contracts of service on the ground that Guéry had no legal authority to engage them.

The substitute Procureur General has given his conclusions, adverse to the judgment of the District Magistrate.

In the discussion before us, some points of a subordinate nature were raised, which may be shortly noticed in the first place. We are clearly of opinion, that judgments of Stipendiary Magistrates, in cases like the present, may competently be reviewed by writ of *certiorari*. This is the established Jurisprudence of the Supreme Court of the Colony, exercising the Jurisdiction of Her Majesty's Court of Queen's Bench, and we are not embarrassed by the want, in the Court of the Stipendiary Magistrates, of the technical *Record* known in the Courts in England. The Stipendiary Magistrates, in the exercise of their jurisdiction, which is eminently a summary one, have ample powers, without the delays and formalities of regular suits at law, to do justice between Masters and servants, and the whole proceedings, taken by them in the Court below are brought up by the writ for the consideration of this Court.

Again it was argued before us, apparently for the first time in the case, that in the order of the Governor, appointing the party before whom, the contract was entered into, to act in place of the Magistrate, an error in the date of the year had crept in, when reciting the law under which he was granting the order. Now assuming the fact to be so ; and farther, that a new plea of this nature could be put forward at this stage of the proceedings, we do not think that the nomination of the party, to act for the Magistrate, would be thereby vitiated. The Governor had full powers to nominate the party, and the Clerical error in question would not render his power ineffectual.

The main question, before us, is the alleged nullity of the contract on the ground that Guéry had no legal authority to sign it.

It is not disputed that Charron was quite competent to enter into the contract with laborers, on behalf of the proprietor ; but it is contended that, by the existing law of the Colony, Charron had no authority to depute his power, and as it were, to hand over his authority to another party *delegatus non potest delegare*.

Now were this a matter to be decided by the ordinary law of the Colony, it could scarcely be disputed that, looking at what was really done, and at what has followed between the parties, any attempt, to set aside this contract of labor, would be futile. Not only execution has followed on the agreement for many months, work has been done, and wages paid, and rations supplied all along, but in the plaint submitted by the laborers, they founded on the contract as a legal document and asked payment of certain sums of wages, which they alleged had been wrongfully withheld from them. They subsequently withdrew this part of their case. But it is contended, that our whole system of labor law is peculiar and statutory and quite out of, and beyong, the ordinary laws of the Colony ; that the state is really a sort of 3rd party interested, and intervening in all these cases and having interests which must be protected by

Courts of Law, and that if any formality, required by this exceptional system, has not been observed, the consequence is the annullation of the contract.

It is said that we have a positive, peculiar and imperative law on the subject, and that the case of Ramghan and ors. *v.* Poulin (6th November 1871 Piston's 1871 page 148) is in point, where the Court set aside, and annulled a contract with the Indian laborers, where every formality had been observed, and where execution had followed and *Rei interventus* had taken place, on the single ground, that the Stipendiary Magistrate had omitted to subscribe the contract. In the present case, the law invoked on the question is article 87 of the Government Notice No. 166 of 11th November 1868 which runs thus, "no "person shall be allowed to sign a contract of "service or a security bond, in the name and "behalf of any employer, unless, he produce "a power of attorney in due form, signed by "such employer."

With respect to the words thus relied upon, we must observe that speaking strictly, they are no part of our *law* as they do not occur in an ordinance, but are rather a directory order of the Executive Council, as to the way in which contracts by deputy are to be entered into. It is clear to our minds, that no such regulation can alter the fundamental laws of the Code as to mandate C. C. 1994 &c., or create a nullity where none is expressly declared by law. That is a penalty for which positive legislative sanction, as in the case of Poulin, is required.

In that case the contract wanting the Magistrate's signature is declared, by the order in Council of 7th September 1838 itself, not to be in *force*. The Judges, accordingly, held in that instance that the contract must be set aside as it was "defective in its most essential statu-"tory requisite." The case now before us is altogether different. Indeed it may be fairly argued that the directory regulation itself has been complied with, for "a power of attorney in due "form, signed by the employer was produced," indeed deposited with the Magistrate. The power was not indeed in Guéry's favor, but the regulation does not require this, at least in explicit terms, and Guéry produced a written order, from the mandatory, to attend the Magistrate, in his name and reciting the authority which the mandatory held from the owner of the estate. We cannot set aside the contract in such circumstances. At the same time we must remark that, in the matter of engagement of laborers, the less the proprietors of Estates leave to subordinates, so much the better. The personal contact of the owner or the chief Manager, on such occasions, with the laborers, will have a healthy tendency to lessen the risks of misrepresentation or misconception of the real terms of the engagements, and to diminish the chance of future disputes.

The judgment of the Court below is quashed without costs.

SUPREME COURT.

—

CLAIM OF $ 1500,—AMOUNT OF A WRITTEN OBLIGATION.— DISCHARGE OF THE SAME BY TWO SUBSEQUENT LEASES,—EVIDENCE,—THE "DROIT DE CHASSE" MAY BE LEGALLY LEASED,—THE LEASE MAY BE LEGALLY TRANSFERRED.

—

RÉCLAMATION DE $ 1500,—MONTANT D'UNE OBLIGATION ÉCRITE,—QUITTANCE D'ICELLE DONNÉE EN VERTU DE DEUX BAUX SUBSÉQUENTS,—TÉMOIGNAGE,—LE "DROIT DE CHASSE" PEUT ÊTRE LÉGALEMENT LOUÉ,—IL PEUT ÊTRE AUSSI LÉGALEMENT TRANSPORTÉ.

—

WIDOW AND HEIRS CARBONEL,
—Plaintiffs.

versus

BURGUEZ AND SUZOR,—Defendants.

—

Before

His Honor Mr. Justice BESTEL, 1st Puisne Judge, and
His Honor Mr. Justice GORRIE, 2nd Puisne Judge.

—

G. GUIBERT,—Of Counsel for Plaintiffs.
A. PITOT,—Attorney for the same.

L. ROUILLARD.—Of Counsel for Defendants.
V. DUCRAY,—Attorney for the same.

—

12*th December* 1872.

This was an action directed by the plaintiffs as representatives of the late A. Carbonel, who died in the year 1870, against the defendants for payment, by the latter, of a sum of

$ 1500, being the amount of a joint, and several acknowledgment by the defendants, of the 28th January 1870, duly registered : of the receipt by them of the above sum from Amedée Carbonel in his lifetime, to be paid back, two years from the date above mentioned 28th January 1870.

The defendants pleaded a release, alleged to have been signed by A. Carbonel in his lifetime, in discharge of their debt.

The facts of the case are the following. One of the defendants, Léon, Burguez, by an instrument under private signatures, in duplicate, duly registered; leased to the said A. Carbonel on the 23rd July 1867 and for eight consecutive years ; 333 acres of land situate at the place called Vacoa, in the District of Plaines Wilhems, the joint property of the the defendants, as a shooting and fishing ground only, on a yearly rent of one hundred dollars.

On the following day, 24th July 1867, a declaration was signed, and handed over to Burguez by Carbonel the apparent lessee, who declared the lease above dated, to have been a mere fiction, null and void between the parties thereto, and bound himself to annull such lease on Burguez's first application to that effect; and A. Carbonel further recognized that Burguez had not leased, but purely and simply allowed him the right of shooting on the land, in the fictitious lease mentioned, for 8 years from the 23rd July 1867 without any remuneration or rent whatever on his, Carbonel's part.

In a subsequent private agreement, of the 28th January 1870, between A. Carbonel in his lifetime on the one part, Burguez and Suzor on the other, we read " nous, soussignés, re- " connaissons avoir reçu ce jour (28 Janvier " 1870) de Monsieur A. Carbonel la somme " de $ 1500, que nous nous engageons, con- " jointment et solidairement, à rembourser à " Monsieur A. Carbonel dans deux ans, à " *partir de ce jour*, avec intérêt à 12 o|o l'an, " payables régulièrement tous les six mois " &a."

By another private agreement, evidently of a subsequent date to the loan of the $ 1500, between A. Carbonel, in his lifetime on the one side, and Burguez and Suzor on the other side, we read that ; Burguez and Suzor on their part promise to renew the right of shooting (le droit de chasse) given by them to A. Carbonel, on the land situate as above, for a period of two years more ; from and after the expiration of the fictitious lease, above mentioned. A. Carbonel, on his part, both on account of the gratuitous enjoyment he had had of the land above mentioned, and on account of the new arrangement between parties, undertook to return to the said Burguez and Suzor their writing obligatory of $ 1500 at the expiration of his ten years lease, this latter writing, entered into for value paid and received, necessarily qualified that back letter of 1870 and gave to the lease a rëal in place of a fictitious character.

On the death of A. Carbonel, his widow and heirs found, amongst his papers, the lease and counter letter above mentioned, and also the writing obligatory, whereby the defendants undertook to repay A. Carbonel the said sum of $ 1500, which they acknowledged to have received from him, on the 28th January 1870. But the subsequent agreement between the same parties of adding two years to the original lease of 8 years, and the undertaking by A. Carbonel to return, at the end of his 10 years lease, the written obligation of defendants for the $ 1500 above mentioned became known to the plaintiffs only after action brought ; and upon service upon them, of the defendants plea, wherein it is averred, that, long before the commencement of this suit, the late Amédée Carbonel in his lifetime had released the defendants from the said obligation.

On Guibert disputing the insufficiency of that release, and pressing for judgment against the defendants, the latter, by Rouillard, urged that the *droit de chasse*, right of shooting, on another's land was a *personal right*, personally to be enjoyed by the party entitled to the same, either with or without his friends ; that such enjoyment was necessarily to cease, either at the expiration of the lease granted, or on the death of the party, as in the present instance, before expiration of his lease, while at the same time the defendants were entitled to the release from payment of the $ 1500, as if the right of shooting had been enjoyed untill 1877.

ROUILLARD cited the opinions of several commentators to prove that the right of shooting was purely personal, whilst Guibert in reply quoted the opinion of other commentators, who upon the strength that the *droit de chasse* was, like all other dismemberments of the right of property, susceptible of being leased or farmed out, have come to the conclusion that on the death of the lessee the lease of a *droit de chasse* vested in his representatives.

Which of the two constructions is to be sanctioned by the Court ? It appears to us that the reasoning of Troplong, supported as it is by a judgment of the Cour Royal of

Rouen, is more *consonant* with the right of ownership than the opinion which wills; that the lease do expire with the lessee's life.

On reference to Dalloz "répertoire de jurisprudence" (chasse, section 3 No. 46 and page 120) we read No. 46. "Le droit de "chasse peut être loué, soit conjointement "avec le fonds, soit séparément. Il n'y a pas "de motifs pour que le propriétaire n'en "puisse pas disposer, comme de tout autre "droit (Article 544 C. C.)

"Le decret du 25 Prairial, an XIII, permet "d'affermer le droit de chasse, dans les bois "communaux; la loi du 21 Avril 1832 et "celle du 24 Avril 1833 permettent d'affermer "le droit de chasse dans les forêts de l'état: "pourquoi donc ce qui est licite à l'égard des "biens communaux, serait-il interdit, à l'égard "des propriétés privées."

"La loi reconnait à tout propriétaire le "droit d'autoriser des tiers à chasser sur son "terrain. Or s'il peut le permettre gratuite-"ment, il doit aussi pouvoir le permettre "moyennant un prix du moins pour un temps "plus ou moins long.

"Le Bail du droit de chasse est donc par-"faitement valable (Rouen 9 Novembre 1826 "Note 2). Troplong louage No. 94."

Holding, as we do, that "le droit de chasse" can be made the subject matter of a lease, the necessary inference is, that from A. Carbonel the lease has descended to his representatives, who are therefore entitled to withhold the return of the defendants obligation of $ 1500, until the expiration of the lease to their author A. Carbonel, and the additional term stipulated. At the same time, the representatives would not be entitled to sue for the $ 1500, so long as the right of shooting was enjoyed.

Witnesses were called by plaintiffs to shew that the right of shooting had been recalled by the defendants, and that they had given authority to Mr. Lucas to shoot over the same ground. The evidence, as a whole, shewed that neither parties were aware of their rights under the altered position of affairs which had arisen by the death of Mr. Carbonel; and especially Mr. Carbonel junior, who acted for the heirs, admitted that he knew nothing of the later document, which the defendants claim as a release from payment of their obligation. We do not, in these circumstances, regard the facts which occurred as of any importance in the determination of the question at issue.

It was suggested at the Bar that should the Court regard the lease as transmissible to the representatives, that a middle course might be adopted, of consent by the parties (viz:) that the representatives should agree to cancel the lease; in which case the defendants would have to be credited with $ 300 for the enjoyment of the defendant's land, for the space of two years, at the rate of $ 150 per annum, whether by their author A. Carbonel or by themselves: and judgment would have to be entered for the plaintiffs in the sum of $ 1200, with interest at 12 per centum per annum, as stipulated in the written obligation from the date thereof, with costs.

In default of cancellation, the plaintiffs will be entitled to the enjoyment of the "droit de chasse" until 1877, but as they cannot be entitled to the two things at one and the same time, viz: the "droit de chasse" and the amount of the written obligation, the present action must necessarily be dismissed.

As to the costs, in the event of cancellation, there will be no costs to either party; and in any point of view, as the defendants showed an undue reticense in withholding, from the representatives, knowledge of the release, there will be no costs in the event of the action being dismissed.

SUPREME COURT.

—

APPEL D'UN JUGEMENT DU MASTER.—OBJECTIONS A DES COLLOCATIONS FAITES PAR LUI.—ETAT DE FRAIS.—MONTANT EXCESSIF DES ÉTATS DE FRAIS DES AVOUÉS.—ART. 2101 C. C.—JUGEMENT INFIRMÉ.

Circonstances d'après lesquelles la Cour a jugé qu'elle ne pouvait admettre certains états de frais comme "frais de Justice," en vertu de l'Art. 2101 *C. C. Elle ordonna, en consequence, aux avoués qui soutenaient, en leur nom personnel, le jugement du Master de payer, eux mêmes, les frais encourus en appel.*

—

APPEAL FROM A JUDGMENT OF THE MASTER.—OBJECTIONS TO CERTAIN COLLOCATIONS MADE BY HIM.—ATTORNIES BILLS OF COSTS.—EXCESSIVE AMOUNT THEREOF.—ART. 2101 C. C.—JUDGMENT QUASHED.

Circumstances under which the Court refused to allow certain bills of costs to be considered as "frais de Justice," in accordance to

Art. 2101 *C. C. and ordered the attornies, who supported the Master's judgment, to bear the costs, on appeal, personally.*

—

TAILLY,—Appellant,

versus

L. A. CASTEL & Others,—Respondents.

—

Before

His Honor Sir Ch. Farquhar Shand, Kt., Chief Judge.
His Honor Mr. Justice Bestel, First Puisne Judge.

—

L. Rouillard,—Of Counsel for Appellant.
A. de Commarmond,—Attorney for the same.
E. Pellereau,—Of Counsel for Alcidony Castel and heirs Castel.
L. A. Thibaut,—Of Counsel for Thomy Castel, Lebrasse and wife and Tessier.
Hon. E. Léclézio,—Of Counsel for Evenor Dubois.
J. Mercier,—Attorney for Alcidony Castel, James Mercier, Ange Hardy, C. Lebrass, G. Cunat, Henry Castel, Louis Renaud, Eudoxe Lieutier, Joseph Florent.
E. Laurent,—Attorney for Widow Castel, Delcy Castel and Eugène Laurent.
J. G. Tessier,—Attorney for Thomy Castel, Ch. Lebrasse and wife, G. Tessier.
E. Léclezio, Senior,—Attorney for Evenor Dubois.

—

13*th December* 1872.

This was an appeal from a judgment of the Master collocating upon the sale price of a certain portion of ground certain judicial costs, which the appellant contended had not been awarded against him, although his share of the price was to be partly burdened with the payment and which he also contended were excessive, both because of the number of attornies, whose costs were allowed as the amount of the costs themselves.

Having looked at those bills, and observing, therein, matters which required explanation, we made two remits to the Master to report upon certain indicated points, and his reports have been received and considered by us along with the arguments of the parties.

The costs complained of were incurred in an action for the nullity of certain proceedings in licitation, raised at the instance of Alcidony Castel, against Clairmond Castel and others, the representatives of Alexis Castel, and also against the widow and heirs of Ernest Castel, in which action Alcidony Castel, the plaintiff, was successful both before the Master and on appeal in this Court.

The costs of the plaintiff were allowed by the Master against certain of the representatives of Alexis Castel who were named in the judgment, with distraction on behalf of Mr. Mercier, the attorney, who had affirmed having made the outlay.

The Supreme Court allowed on the appeal costs to the client of Mr. Mercier, and also to widow Ernest Castel and Delcy Castel, represented by Mr. Attorney Laurent, and to Lebrasse and wife and Thomy Castel represented by Mr. Attorney Tessier, against the same parties as were named in the judgment of the Master.

So far, therefore, as regards the costs of Mr. Mercier in the action of nullity before the Master, amounting as taxed to £92.15.4 and the sum of £ 25.16.0 for the expenses of appeal and also to the bills of Mr. Laurent and Mr. Tessier for the appeal, the taxation has been completed in the usual manner before the Master in presence of the attorney for the parties against whom the costs were granted, or after he was duly called. We can only say, after looking at these documents, that we cordially approve of the course followed by the Master, of taxing off £ 20 from the fee of £ 50 for Counsel for discussing the case before the Master, and of taxing off £ 20 from the fee of £ 50 inserted as fee with brief in the appeal; and we think that the sums might even have been judiciously further reduced, as we can discover no such grounds of importance, or difficulty in the case, as to warrant fees so much above those contemplated by the Ordinance in ordinary circumstances.

The fees, thus allowed and to be allowed in similar cases, in future, are by no means necessarily to be the limit of the remuneration of Counsel, to be paid by those who employ them, but simply the fees which can fairly and justly be allowed against the losing party. We have to suggest also on this head that the Master, for the future, require the particular fees to be stated in the mode pointed out by the Ordinance, and not to allow one general fee for the cause, in order that a more just appreciation may be made by the taxing Officer of the fees to be allowed.

It is too late to consider whether, in the

first appeal, there was any necessity for widow Ernest Castel, and Lebrasse and wife and Thomy Castel being represented by different attornies and Counsel. Their interests in the action of nullity, in fact, appear to have been identical with that of Alcidony Castel, but no objection was made in that cause upon any such ground.

As the Master, however, in one of his reports, asks for direction in similar cases we have to add, that while the law may sometimes require parties, such as guardians of minors to be represented by different legal advisers, costs ought only to be allowed as against the losing party condemned in costs, to more than one successful party where the points at issue were so clearly different as to require to be sustained by a separate argument, and to be solved by a substantive judgment. There was no such difference between the interests of the clients of Laurent and Tessier in this instance, and that of the client of Mercier; but the question was not brought before the Court at the proper time.

The objection made to the costs, under the present appeal, is not made by the losing party in the first appeal to the amount as taxed by the Master, nor by that losing party at all; but by a new appellant to a mode of of dealing with these costs by the Master, under the Ordinance for the distribution of the sale price which the appellant considers to be unjust. The appellant took no active part in the case before the Master, or under the first appeal. He, in fact, abided by the decision of the Court.

The Master, however, upon the application of the attornies who represented the gaining parties in the first cause, but who had apparently not got payment of their costs from the losing party, although there is nothing produced to show that they had used the compulsitor of the law for that purpose, admitted not only the costs allowed by the Court, but also costs claimed by the clients of Messrs. Laurent and Tessier for the case before the Master which were not allowed by the Master's judgment, as privileged claims in the name of *frais de justice*, upon the sale price of the property to be distributed. The sale price neither belonged to the heirs of Alexis Castel, who have been losers in the first action, nor solely to Alcidony Castel who had been the gainer, nor even solely to the heirs of Ernest Castel, of whom Alcidony was one; but it belonged for one half to the appellant Tailly, who had abided by the decision of the Court, and whose share in the property has been sold to Dubois.

Now without entering into the question whether attornies costs in an action of this nature can ever be held to be *frais de justice*, within the meaning of Article 2101 of the code, what we have to consider, here, is whether the costs, which have been given against the heirs of Alexis Castel, can be held as *frais de justice* and privileged, not merely against all the heirs of Ernest Castel who, although substantially the gainers in the cause, were not all in the same position; but also against the appellant Tailly who did not join the litigants, before either the Master's Court or the Supreme Court, and simply abided by the decision of the Court. We confess we see nothing, in the Article 2101, to warrant us in sanctioning so unusual a course. The parties primarily liable for these costs are the heirs of Alexis Castel against whom the judgments were given. The parties next in order, supposing after duē execution, the costs or a portion of them should remain unpaid, are the clients of the respective attornies; and it is quite premature to consider whether, in any circumstances, a party who took no part in a litigation, but simply abided by the decision of the Court, is to be subjected to the payment of costs, not awarded against him, on the general ground of the benefit he may have obtained by the result and the action.

We are, therefore, of opinion that the distribution of the sale price must be made without any deduction from the share of Tailly, or of Dubois in his right, of any part of the costs, of the first discussion before the Master, or of the first appeal.

This will apply to the following claims of Mercier, appearing in his act of production.

Bill of costs for Alcidony Castel in case before the Master, judgment delivered 5th September 1871	$ 463.75
Bill of costs, defence to appeal....	129.06
Bill of costs to obtain writ of execution on Master's judgment.....	14.54
Bill of costs to obtain writ of execution on judgment of Supreme Court	12.62
Costs for claiming the above costs..	10.18
	$ 630.15

The judgment will not apply to the following bills of Mercier which he has also been allowed by the Master, although the number of them appears to us somewhat unnecessary viz:

Bill of costs in matter of distribution	$ 97.48
Bill of costs in act of Production for Alcidony Castel	10.18

Bill of costs in act of Production for Delcy Castel	10.18
Bill of costs in act of Production for widow Castel	10.18
	$ 128.02

The following costs also of Messrs. Laurent and Tessier cannot be allowed, as privileged "frais de justice," so as to affect the share of Tailly or Dubois viz :

1o. LAURENT.

Bill of costs in original suit before the Master for widow Castel and Delcy Castel .....$	154.83
Bill of costs, defence to appeal....	36.77
Bill of costs to obtain writ of execution	14.54
Bill of costs, production of these costs.....	10.18
$	216.32

2o. TESSIER.

Bill of costs in original suit for Lebrasse and wife and Thomy Castel .....$	145.58
Bill of costs, defence to appeal....	36.77
Bill of costs to obtain writ of execution	14.54
Bill of costs to claim the above costs	10.18
$	207.07

We have said that the sale price must be distributed without any deduction, from the shares of Tailly or Dubois, of these costs, but it may be asked whether these costs are not, at all events, privileged *frais de justice* on the shares of the Castels; the Castels have not appealed, and although their interest in this question is necessarily different from that of their attornies who appear, in their own personal names, to defend the jndgment of the Master, the clients appear before us as represented by these attornies and have taken up the same attitude. The attornies, moreover, represent in the distribution different clients from those for whom they appear before the Court. In this position of affairs, and as minors are involved, the interests of some at least of these parties might run the risk of being sacrificed if we were to take upon us to decide whether the costs, remaining due by the heirs of Alexis Castel, can be justly regarded as privileged *frais de justice* upon the shares of some of the heirs of Ernest Castel and not upon those of others.

It appears to us, however, that the Master's judgment must be looked at as a whole, to be supported if we had taken the same view as to these costs being privileged *frais de justice* on the property generally, or to be set aside *in toto*, if we could not approve of that view as a basis for the distribution. We, accordingly, annul and set aside, the judgments of the Master appealed against, and direct him to proceed anew to the distribution of the sale price by way of ordre, excluding entirely from the ranking the attornies bills above mentioned, which are primarily due, and which remain due at this moment, by the heirs of Alexis Castel, whom we cannot look upon as mere men of straw whose names were employed, solely, for the purposes of the law suit; as in that case, their application for licitation, which the expensive suit before the Master was brought to annul, could much more easily have been disposed of, than by the proceedings actually adopted. Our decision on this head does not prevent the attornies recovering their costs from the proper debtors, whoever those debtors my be, in any legal manner.

The bills of costs complained of being thus set aside in the distribution, it is not necessary to refer to them, nor to the subjects treated of in the Master's reports, farther then has already been done, with the exception of the question of Usher's fees; and as regards these, as we believe the existing system to be unsatisfactory, we shall confer,—apart from any particuliar case, with the Procureur General, the Attornies and the Ushers, with the view of putting matters on a more satisfactory footing for the future.

As to the act of Production to the ordre for witnesses fees, this would not have been necessary, had the attorney paid them at the time. The excuse, given for him in the Master's report, that their aliocation was only presented after his bill of costs was taxed, cannot be allowed as he must have known perfectly well his own witnesses had to be paid. He does not omit, moreover, to charge $ 10.18 for the act of production of the fees of these witnesses, and their claim having been put in, they become parties to the ordre, and hence respondents to this appeal; the same attorney appearing for them, all tending most unnecessarily to swell up the charges. The costs of the act of production cannot be allowed, but we authorise the Master to deduct the amount of the fees from the share of Alcidony Castel, the plaintiff in the proceedings, and to hand it to the witnesses without farther expense. We look to the Master to discourage all such methods of complicating procedure and increasing costs.

One other matter, which appears on the face of those documents, we must refer to. Mr. Attorney Mallet puts in an act of production for one Lafleur, an attorney's clerk,

claiming the amount of a " bon " for $ 28, granted the 9th December 1861 by Alcidony Castel. This venerable " bon " had already been produced at two other distributions, and each time the attorney claimed his $ 10.18; the expenses having in this manner amounted to $ 30.54, upon an original amount of $ 28. The sum of $4.22 had been received to account, but the full sum now claimed upon the "bon" of $ 28 is $ 54.32. To allow such an act of production for such a sum, even to be produced, is to encourage the heaping up of costs in a most unjustifiable manner, which the Master, we doubt not, will discourage, and even, if necessary, take decisive measures to prevent.

The costs of the present appeal, in favor of Tailly, must be borne by the attornies, Mercier, Laurent, and Tessier, who support the Master's judgment in their own personal name, in the proportions of $\frac{3}{4}$ by Mercier, and $\frac{1}{8}$ each by Laurent and Tessier.

The correction of the ordre to be made without farther costs, in favour of any of the parties claiming a share in the sale price.

BAIL COURT.

—

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT DES SEYCHELLES — ART. 1166 C. C.—DEMANDE EN NULLITÉ D'UN ACTE NOTARIÉ, LES FORMALITÉS REQUISES PAR LA LOI N'AYANT PAS ÉTÉ SUIVIES—ARTS. 457 & 458 C. C.—" RES JUDICATA "—JUGEMENT INFIRMÉ, AVEC DÉPENS.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF SEYCHELLES,—ART. 1166 C. C.—DEMAMD TO SET ASIDE, AS NULL AND VOID, A NOTARIAL DEED, THE FORMALITIES REQUIRED BY ARTS. 457 & 458 C.C. NOT HAVING BEEN COMPLIED WITH,—PLEA OF " RES JUDICATA ",—ART. 1351 C. C.—JUDGMENT QUASHED, WITH COSTS.

—

ROSEMOND GONTIER,—Appellant,

versus

SAVY & OTHERS,—Respondents.

—

Before

His Honor MR. JUSTICE GORRIE, 2nd Puisne Judge.

—

G. GUIBERT,—Of Counsel for Appellant.
F. ROBERT,—Attorney for the same.

H. GALEA,—Of Counsel for Respondents.
J. H. ACKROYD,—Attorney for the same.

—

13*th December* 1872.

This is an appeal from a judgment of the District Magistrate of Seychelles.

The respondent Savy on the 23rd of April last, acting in virtue of the Article 1166 of the Civil Code (the Article which permits creditors to exercise the rights and actions of their debtors) sued the appellants to shew cause why a Notarial deed drawn up by Despilly St. Sorre, lately a Notary Public at Seychelles, dated 20th January 1868, witnessing a loan made by Rosemond Gontier to the widow and heirs of the late Adolphe Loizeau, should not be declared null and void. The *particulars* of Plaintiff's demand set forth as grounds of nullity, that the loan was contracted by widow Loizeau in the name of her minor childen without the authorization of a Family Council, contrary to Articles 457 and 458 of the Civil Code, and other grounds of a similar nature.

After a preliminary plea had been entered by the defendants and set aside, they pleaded generally *res judicata*, founding upon a judgment given by the District Court of Seychelles, on the 3rd day of July 1868 in an action at the instance of the same plaintiff and to have the same deed set aside.

The District Magistrate held that the plea of *res judicata* was not applicable, as in that former case the plaintiff Savy had appeared in his own personal name, and as holding the rights of certain of the other plaintiffs; whereas in the action now under consideration he sued as holding the rights of his debtors, and as no other plea than that of *res judicata* had been pleaded, he, upon the merits, declared the Notarial deed of 20th January 1868 null and void.

The appellants have brought this judgment under review of the Court upon the following among other grounds.

1o. Because the Notarial deed thus decla-

red null had been tacitly homologated by the Supreme Court, on 27th February 1868, in an action where the appellant Gontier was subrogated into all the rights of the heirs Savy under that deed.

2o. Because the plea of *res judicata* applied, the record of the earlier case proving that the object in litigation was the same, and that the parties were the same, and acted in the same qualities.

3o. Because the District Magistrate was wrong in fact in holding that the plaintiff Savy did not, in the earlier case, exercise the rights of his debtors, as that quality is expressly set down in the plaint.

4o. That the Magistrate ought not to have decided the case on the merits, without further hearing the parties, after the plea of *res judicata* had been set aside.

The Counsel for the parties, were fully heard on the 27th of last month, the Honorable the Procureur General being present at the sitting, as the rights of minors were involved, and his conclusions in favor of the appellants were given at length on the 12th instant.

Having considered the arguments of Counsel and these conclusions, I now proceed to give Judgment.

JUDGMENT.

And first as to the plea of *res judicata*, because it is evident if the Magistrate has wrongly refused to give effect to this plea, it will be unnecessary to enquire further into the matter. Article 1351 Code Civil sets forth, in the most compendious form, the limits of the authority of the *chose jugée* " Il faut que " la chose demandée soit la même; que la de- " mande soit fondée sur la même cause ; que " la demande soit entre les mêmes parties, et " formée par elles et contre elles en la même " qualité."

It is this last qualification which the Magistrate holds to be inapplicable. He looks upon the action of 1868 as not having been instituted by the plaintiff Savy as exercising the rights of his debtors, as in the present instance.

The expression in the Roman law from which the Article in the Code is taken is *"eadem conditio personarum:" Quum quæritur, exceptio, rei judicatæ noceat necne ; inspiciendum est an idem corpus sit, quantitas eadem, eadem causa petendi, et eadem conditio personarum ; quæ nisi omnia concurrant, alia res est".*

Now what is this *"même qualité,"* this *"eadem conditio,"* of the persons. Can it ever mean that a person, who possesses within himself several qualities, at the same time, a personal interest, an interest as acting for others, an interest as in right of his debtors, can bring before a Court of Justice the subject matter of contention, and call before a Court all the parties interested and yet, can have the same question tried over and over again, by simply dexterously shaping his plaint, so as to represent himself acting in one capacity only at a time, although all the capacities were as much accumulated on his head at first as at last? This would be a very startling proposition, because *" si quis quum totum petiisset, partem petat, exceptio rei judicatæ nocet."*

But has the plaintiff in the action before the District Magistrate, in point of fact, assumed a different quality from that adopted by him in the action of 1868? On looking at the Civil Record No. 57 of 1868 in question, it will be found that the plaintiff sues in his own personal name and as holding the rights of other heirs Savy, and also as creditors of the succession of the late Adolphe Loizeau ; and the defendants are Rosemond Gontier, the widow and heirs Loizeau and Furcy Demaine, the latter, acting as Sub-Guardian, and the widow, as legal guardian of certain minors Loizeau: the whole of the defendants being called as representatives and heirs of the late Adolphe Loizeau.

In the case under appeal, the plaintiff sues in virtue of Article 1166 of the Civil Code, as exercising the rights of certain debtors. These alleged debtors are three of the heirs Loizeau, who were defendants in the action of 1868, and they are debtors under the same position of affairs, that authorized the plaintiff to call them as defendants in the suit of 1868.

Now, if the plaintiff Savy sued in 1868 in his own personal name, and as holding the rights of others, the whole, as creditors of the Succession Loizeau, and thought proper to call all the heirs Loizeau as defendants, he is surely not acting in another quality, when again he sues as creditor of the succession Loizeau, altho' he now represents himself as acting as the especial creditor of three of the heirs of that same succession? The subject matter of dispute is the same, the parties are the same, and the sole difference is that the plaintiff styles himself, now, as the creditor of three of the heirs, nominatim, of the succession Loizeau, whereas formerly he represented himself as creditor generally of the same succession.

To hold that these are separate qualities, and that *res judicata* does not apply, would bring us to this remarkable result, that the

judgment of 1868 could not be quoted against the plaintiff, because it was obtained at his own instance against the three parties, amongst others, whose creditor he represents himself to be; and that the remaining defendants are to be subjected to a new law suit, in connection with the same matter, whenever the plaintiff who has lost his cause as a creditor generally of the succession Loizeau, may chose to bring a fresh action by representing himself as the special creditor of one or other of the individual heirs, whom he has already called as defendants.

Upon this ground, therefore, I am of opinion that the judgment of the District Magistrate cannot be maintained. The action of 1868 was brought to a conclusion, by a decision of the then District Magistrate in which he held, that a judgment in subrogation of the Supreme Court of Mauritius in favor of Rosemond Gontier, in an action in which Savy was a party, having regarded and acted upon the Notarial deed sought to be set aside as good and valid, it could not be called in question in the inferior Court.

The present judgment of the District Magistrate, without hearing parties upon the merits, when doubtless, the same ground for upholding the Notarial deed would have been pleaded, has set aside that deed and thus opened up the whole question which were brought to a close by judicial prooceedings before the Supreme Court in 1868.

It would not have been too much, to have looked for somewhat greater care and more detailed reasons in the judgment of the District Magistrate, before coming to so important a conclusion.

The judgments, given by the Magistrate and appealed against, are accordingly set aside and the appeal sustained with costs.

BAIL COURT.

—

APPEL D'UN JUGEMENT DU MAGISTRAT DU DISTRICT DE PORT LOUIS,—RENVOI DEVANT LE MAGISTRAT,—PREUVE TESTIMONIALE,—IDENTITÉ.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF PORT LOUIS,—REMIT TO THE MAGISTRATE,—ORAL EVIDENCE,—IDENTITY.

—

TAULOCK ALIAS APOUYNE,—Appellant,

versus

AGA MAHOMED HOSSEN & ANOTHER,—Respondents.

—

Before

His Honor MR. JUSTICE GORRIE, Second Puisne Judge.

T. L. JENKINS,—Of Counsel for Appellant.
P. F. LASTELLE,—Attorney for the same.

P. L. CHASTELLIER,—Of Counsel for Respon-
E. GANACHAUD,—Attorney for the same. dents.

—

13th December 1872.

This is an appeal from a judgment of the Senior District Magistrate of Port Louis upon the ground that the defendant, upon whom the plaint was served, was not the debtor in the account sued for.

In the Court below when the case came on for hearing, the defendant produced his certificate of residence as an alien, who had completed his five years, under the Police Regulations, to show that his name was not Taulock *alias* Apouyne but Tunghaen. But the Magistrate refused to admit the certificate. The defendant on being examined swore that he was not Tholuck, whereas the plaintiff was equally positive as to his being Tholuck and the debtor in the account sued for. The District Magistrate without giving a substantive decision as to the defendant being Tholuck or not, gave judgment for plaintiff.

In these circumstances, when the appeal came on for hearing, I thought it best to remit the case to the Magistrate to take evidence on this question of identity, and the evidence on this point has been reported, but still without a substantive decision of the Magistrate upon the point.

The parties, however, consented to my giving judgment upon the appeal, upon the evidence as reported and that already in the cause.

The point is not free from difficulty. The Superintendent and other officers of Police examined, who know the defendant as chief of one of the Chinese places of worship, state that they have known him many years, but that they never heard him called Tholuck, and have known him as Tangahen or Ah Puy (Ahpouyne) the name of his certificate being that of Tanghahem.

On the other hand, the creditor in the account has positively sworn that he knew him as Tholuck and that he is the debtor in the account sued for; and the Usher of the District Court deposed, that, on serving the writ, the defendant admitted himself to be the debtor of Aga Mahomed Hossen, but not to the amount claimed.

There is at least no doubt that the defendant is Ah Puy or Ahpouyne, the name under which he is sued, and that he was at about the time the debt was incurred in business in Port Louis.

The position which the appellant took up he has not been able to sustain, viz: That he was simply Tangahem and not Tholuck *alias* Ahpouyne, it having been amply proved that if Tholuck was a separate personage at all, he was Tholuck, pure and simple, without any *alias*; and that the defendant is at least Ah Puy or Ahpouyne whether his other name be Tholuck or Tangahem, or both, or neither.

Taking, therefore, the positive evidence of the creditor that the defendant is the man with whom he traded, and the admission to the Usher, with the evidence derived from the appellant's own witnesses that he is not simply Tanghem but Ahpouyne, and that the Tholuck spoken of, by the witnesses, was not Ahpouyne, I must dismiss the appeal with costs.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—ACTION EN DOMMAGES ET INTÉRÊTS POUR INEXÉCUTION D'UN CONTRAT, —MANDAT, — PREUVE TESTIMONIALE, — COMPÉTENCE, — RÉCLAMATION EXCÉDANT £ 50,— ABANDON D'UNE PARTIE DE LA SOMME DEMANDÉE,—AMENDEMENT.

Prenant en considération les principes de droit exposés dans l'affaire Tournois vs. Désiré (Piston, 1872, p. 61) et surtout n'oubliant pas le moment où la question de compétence fut soulevée pour la première fois, la Cour décida que le Magistrat avait bien jugé en permettant au plaignant d'amender sa plainte. Il fut, en sus, décidé, dans l'espèce, qu'un employeur était responsable des conventions faites avec un tiers, par son employé, attendu que l'on n'avait allegué ancune fraude de la part du dit employé.

—

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE,-ACTION IN DAMAGES FOR BREACH OF CONTRACT,—PRINCIPAL AND AGENT,—ORAL PROOF,—CLAIM EXCEEDING £ 50,—WANT OF JURISDICTION,—ABANDONMENT OF PART OF THE DAMAGES,—AMENDMENT.

Taking into consideration the principles laid down in the case of Tournois vs. Désiré, (Piston: 1872, p. 61) and especially looking to the time at which the objection to the jurisdiction was brought forward, it was held by the Court that the Magistrate was right in allowing the amendment of the plaintiff. It was, further, decided that a party is bound by the act of his "employé" against whom fraud was not alleged.

—

TOURETTE.—Appellant,

versus

TERRÉ,—Respondent.

—

Before

His Honor MR. JUSTICE GORRIE, Second Puisne Judge.

—

L. ROUILLARD,—Of Counsel for Appellant.
E. SAUZIER,—Attorney for the same.

E. VAUDAGNE,—Of Counsel for Respondent.
Attorney for the same.

—

13th December 1872.

This was an action before the Acting District Magistrate of Savanne entered by the Respondent against the appellant calling upon him to deliver a certain small quantity of wood and claiming, in addition, damages to the amount of £ 50. The case came on for hearing on 24th September when the Counsel for defendant pleaded "not indebted", and objected to oral evidence being received to prove the agency of an employé who undertook to deliver the wood to the plaintiff. After this objection had been set aside by the Magistrate, the defendant at a subsequent sitting objected to the jurisdiction on the ground that the plaint sued for £ 50, and in addition, a restitution of balance of money paid for the wood. Thereupon the plaintiff's Counsel moved the Court to allow the damages to be laid at £ 20 which was allowed by an amendment of the plaint.

Evidence was then heard, and the Magistrate, ultimately, gave his decision in favor of the plaintiff for the amount of wood contracted for, but not delivered (including four palisades which were said to have been bad, and which the Magistrate found to have been the case) to be delivered to the plaintiff withim 48 hours, or the defendant to refund plaintiff the value thereof, *i. e.* the sum of $ 26.25 plus $ 3.15 for the bad wood received by plaintiff; in all $29.40, together with $31 as damages, and interest on the sum of $ 26 25 at the legal rate from the date of the " mise en demeure ", with costs.

This judgment is appealed against generally, and after hearing parties, I took time to consider, especially upon the question of jurisdiction and the amount of damages.

A similar question of jurisdiction arose in the case of Tournois *v.* Désiré in which judgment was given on 26th of July last. There, interest was demanded which by a calculation and when added to the principal was found to exceed the jurisdiction of the Magistrate, and the Court sustained an amendment before the hearing, by which the plaintiff abandoned the interest.

Considerable weight was given in that case to the fact that the plaint did not, on its face, show a sum concluded for greater than £ 50 and that before hearing, the amendment was allowed.

Here, a similar state of things exists in so far as the pecuniary amount concluded for did not exceed £ 50, but the performance of a fact was also demanded, which if not fulfilled, it was contended, gave rise to an alternative additional amount in money. So soon as the attention of the plaintiff and the Magistrate was drawn to this state of affairs, and before it was necessary to consider as to the alternative amount in money, in the event of the non-performance of the fact, the plaintiff reduced his claim in damages and the Magistrate allowed that amendment of the plaint. It is to be observed also that the objection to the jurisdiction was only raised after the defendant had himself pleaded to the action, and called upon the Magistrate to decide on an exception which he had raised.

I am of opinion, that, under the principles laid down in the case of Tournois against Désiré, and especially looking to the time at which the objection to the jurisdiction was brought forward, the Magistrate was right in allowing the amendment of the plaint and that the appeal on this head cannot be allowed.

As to the merits, it appears that an "employé" of Mr. Tourette had sold certain wood to the plaintiff *à livrer*, for which the plaintiff paid $ 47.79 on 15th June 1872, the date of the receipt in process. Part of this wood was actually delivered, and it is not contested that the money was paid; but Mr. Tourette objects that his "employé" was not authorized to enter upon a transaction of such a nature. I think upon the evidence the Magistrate did rightly in disregarding this defence, and holding the defendant bound by the act of his "employé" against whom fraud was not alleged, but simply, so to speak, an excess of zeal in selling wood of a particuliar size, altho' he had not the exact quantity or description actually in store upon the property.

I am of opinion, however, that the Acting Magistrate has allowed himself to be led away in the calculation of damages by the ingenuity of the plaintiff.

The transaction was a paltry one of £ 9 upon which a little more than £ 5 worth remained to be delivered, and the damages allowed amount to no less than $ 31.

Looking at all the circumstances of the case, I think a sum of $ 5 will amply compensate the plaintiff for the non completion of this small contract, and without interest, however trifling that may be, on the original sum.

The judgment of the District Magistrate, otherwise, is sustained, so that in this appeal, while the appellant is a gainer by the difference of damages and interest, he loses on the question of jurisdiction and on the merits.

The justice of the case will, in these circumstances, be met by each party paying their own costs in the appeal.

I have to add that the copy of the proceedings sent up by the District Clerk contains many passages of the evidence underlined. This is irregular, and must not be repeated, although I have no doubt the markings have also been upon the original.

BAIL COURT.

—

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT DES SEYCHELLES,—ACTION AU PETITOIRE,—ART. 26 DU CODE DE PROCÉDURE CIVILE,—PROCÉS-VERBAL D'ARPENTAGE,—ACTION AU POSSESSOIRE.

Jugé par la Cour qu'une demande en nullité d'un procès-verbal d'arpentage ne pouvait-être considérée comme commencement d'une action intentée au petitoire.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF SEYCHELLES,—PETITORY ACTION,—ART. 26 OF THE CODE OF CIVIL PROCEDURE,—MEMORANDUM OF SURVEY,—POSSESSORY ACTION.

Held by the Court that a demand to set aside, as null and void, a memorandum of survey was not of a nature to fall within the terms of Art. 26 of the Code of Civil Procedure as being an action "au petitoire."

—

BAILLON & WIFE,—Appellants.

versus

P. C. CLODOALD RAMBERT,—Respondent.

—

Before

His Honor Mr. JUSTICE GORRIE, Second Puisne Judge.

—

W. NEWTON,—Of Counsel for Appellants.
J. PIGNÉGUY,—Attorney for the same.

G. GUIBERT,—Of Counsel for Respondent.
J. GUIBERT,—Attorney for the same.

—

13th December 1872.

This is an appeal from a judgment of the District Magistrate of Seychelles of date 2nd September 1872, by which upon an exception pleaded by the defendant Rambert, in the action against him, at the instance of the present appellants, the Magistrate held that a former action, at the instance of the same plaintiff against the defendant, contained all the characteristics of a Petitory action, and was a petitory action, and that the action then pending before him was a possessory action; that, although, in the said petitory action, plaintiff was only nonsuited and no final judgment given either against plaintiff or in his favor, yet, that Article 26 of the "Code de Procédure Civile" applied, and plaintiff having chosen to sue defendant in a petitory action could not now sue him in a possessory one. The Magistrate accordingly nonsuited the plaintiff with costs, and upon the motion per plaintiff for final judgment found for the defendant with costs.

The appeal is based upon the unsoundness of that judgment in point of law.

Article 26. of the "Code de Procédure Civile" cited is to the following effect; "le "demandeur au petitoire ne sera plus receva- "ble à agir au possessoire." The action formerly raised by the appellants against the respondent was to have a memorandum of survey of the respondent's Estate, dated 4th July and 14th August 1871, drawn up by Théodore Butler, sworn Land Surveyor, declared null and void and of no effect whatsoever, and this the Magistrate held was of a nature to fall within the terms of the Article as being an action "au pétitoire."

As it is not unfrequently the case, the commentators are not at one as to the precise meaning to be given to this Article, or rather to the precise limits within which it is to be held to apply. In this case we have, not merely, to consider whether should the action "au petitoire" be entered, the plaintiff loses his right to sue "au possessoire" in connection with the same matter, but whether he does so, should the action an "petitoire" not be followed out to final judgment; and further to determine what is included within the definition of the action "au pétitoire" spoken of in the Article.

The action which the District Magistrate describes as having the characteristics of an action "au pétitoire" was not avowedly for the purpose of establishing a title to the property, but solely for the purpose of setting aside a survey upon the ground of irregularities in the procedure. Had the plaintiffs in that action succeeded in their suit, the only apparent result would have been to have left the boundaries of their property and that of the respondents undetermined, and thus have left the way clear for the action "au possessoire" or "au pétitoire" as might have been considered necessary.

The respondents, however, have cited a case

of Bourgoin v. Gillet of 1st February 1860, where the Court of Cassation held that "celui " qui se prétendant troublé dans sa posses- " sion, actionne en référé l'auteur du trouble " prétendu à l'effet de faire constater l'état " des lieux, et poursuit l'expertise ordonnée " dans cet objet par le tribunal devant qui a " été renvoyée sa demande, se rend par la " non recevable à agir au possessoire, pour le " même fait." There certainly appears to be a similitude between the survey of the land Surveyor in the case, held to be a petitory action by the District Magistrate, and the expertise asked for and granted in the French case cited ; and the judgment is all the more worthy of consideration as the definition given of the petitory action by the authorities would scarcely have led us to expect such a decision. We find for example in " Chauveau sur Carré (volume 1 titre IV) " the following definition of the "petitoire", " nous " avons dit que la présomption de propriété, " attachée à la possession, cède à la preuve du " droit de propriété revendiqué contre le pos- " sesseur. *C'est cette revendication qui constitue* " *l'action pétitoire,* par laquelle le propriétaire " d'un fonds, ou d'un droit réel attaché au " fonds, agit contre celui qui possède l'un ou " l'autre à l'effet d'en être déclaré proprié- " taire."

The French case shows that the " Cour de Cassation " were disposed, at least, in that particular case, to take a wider view of what constituted the petitory action; and this induces us to consider more attentively the suit before the District Court which the Magistrate states to have exhibited the characteristics of a Petitory action.

We observe first, that it did not ask for an expertise or for a survey, but for the annullation of a survey which had been made under the authority of the Court at the instance of the respondents. This is the converse of the position in the French case ; there, the party who was found to be not entitled to sue " au possessoire " was the party who had asked for the expertise, and, as it were, perilled his case at the very outset upon something different from possession,

The principle, upon which Article 26 is based, is not an arbitrary restriction upon the rights of litigants, but simply a natural deduction from the nature of the two actions treated of. The person who takes his stand upon his possession for year and day, makes a choice which prevents him either in the same action, or at the same time, pleading his titles or possession for the prescriptive period, which, if not wholly inconsistent with his mere possessory pretension, would, at least, mix up and confuse things entirely distinct. In like manner, the party who sues at once " au pétitoire " is assumed to have parted from his right to plead the more elementary stage of the short possession, either because he could not maintain it, or because he preferred to meet his adversary at once on the higher ground of title. But great care must be taken, in applying these rules, not to shut litigants out from obtaining the judgment of Courts of Justice, upon their pretensions, by an arbitrary classing of demands either under the one category of suits or the other.

Can an action to obtain the setting aside of a survey be regarded as " au pétitoire " in the same sense as an action to obtain the fixing of boundary walls, by experts? The former is, as it were, to have an expertise taken out of the way, and to leave room for the other contentions of parties; the latter, as the Court of Cassation held, is the submitting of the question of property to the Court in such a manner as to exclude the subsequent raising of a possessory action.

Unfortunately we cannot further compare the conclusions of the two actions, as the report of the french case is not sufficiently minute ; but looking at what was concluded for in the action held by the District Magistrate to have all the characteristics of a petitiory action, we look in vain for any conclusions, which claim the revendication of the property, or which submit in any way the question of the right of property in dispute to the jurisdiction of the Court.

Had the plaintiff in that action succeeded on every point, neither the question of possession nor that of property would have been decided. In these circumstances, we, certainly, cannot assume that the " Cour de Cassation" would have pronounced the same judgment here, or held that the party, who opposed a survey and sued for its being annulled, was in *pari casu*, as to his right to raise a possessory action with him who had demanded the expertise as a means for settling a dispute between himself and a terminous proprietor.

There is one other point to be considered. In the french case it is expressly stated, and founded on, that the expertise was followed out to its conclusion by the party who, afterwards, sued " au possessoire " ; he apparently not having been satisfied with the result of the machinery which he had set in motion. Now, there are discussions in the books on Civil Procedure as to the effect upon the rights of parties, under Article 26, if an action has been brought " au pétitoire," and not followed out to its conclusion ; and the general result seems to be that if a petitory action had been merely begun, and had been withdrawn with

consent of the defendants in the manner provided for in the Code, it would not be a bar to a subsequent possessory action. The action founded on by the District Magistrate in his judgment, whether petitory in its nature or not, was not followed out to final judgment. The plaintiff was simply nonsuited, and the non suit, it is needless to observe, is very different from a final judgment affirming or negativing the conclusions of an action.

There is no judgment now standing upon any petitory conclusions of the plaintiffs which can be quoted against them in their possessory action.

The result, then, at which we arrive is this; that, what the District Magistrate held to be a petitory action, was one to set aside a survey. And the strongest case which the respondents can quote in support of the judgment is one where the action concluded for an expertise to establish the exact position of a coterminous boundary, the former, so far as any similitude exists between the actions, being the converse of the latter; and also that in the case quoted the expertise was followed out to its conclusion whereas, here, there was simply a non suit.

In these circumstances, and as the result of the application of Article 26 by the District Magistrate is to shut out from a Court of Justice a party who has not had his pretensions, whatever they may be, disposed of in any petitory or possessory action. I hold that there has been a misapplication of the Article quoted and I sustain the appeal, and quash the judgment complained of with costs. The District Magistrate will now proceed to hear the case on the merits.

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

A. G. ELLIS, Esq., Acting Procureur and Advocate General,
L. COX, Esq., Substitute Procureur & Advocate General.

VICTOR ESNOUF, Esq., Master,
J. A. ROBERTSON, Esq., Substitute Master,

O. D'EMMEREZ DE CHARMOY, Esq., Registrar.
L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
G. A. RITTER, Esq., Registrar.
JAMES BROWN, Marshall.
J. BOUCHET, Queen's Proctor.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT;
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E, ... 1828
Campbell, C. M. 1841
Bazire, E 1858
~~Leclézio, E J~~ 1858
~~Pellereau~~, E. 1860
Martin Moncamp, P. G 1861
Rouillard, L 1861
Chastellier, P. L 1864
Delafaye, V..... 1864
~~Gaibert~~, G. 1864
Newton, W. 1864
~~Lepoigneur~~, I. 1864

Jenkins, T. L..... 1865
Florent, E 1865
Desmarais, E..... 1866
Bazire, E. 1867
Galéa, H. 1867
~~Lemière H.~~ 1868
Avice, H..... 1868
Beaugeard, P. 1868
Pilot, G..... 1868
Vaudagne, E..... 1868
Hamon, A..... 1869
Lionnet, F. 1870

~~Ollier~~, R..... 1870
Poulin, F..... 1870
Forget, A..... 1870
Thibaud, L. A..... 1871
Pelte, E. 1871
Desenne, O 1871
Boucherat..... 1871
Galais, E. 1871
Mathews, L. F. 1872
André, A..... 1872

ATTORNIES (actually practising).

Pastor, E 1840
Mercier, J..... 1840
Lalandelle, G..... 1842
Hewetson, W..... 1846
Laurent, E. 1846
Ducray, E. 1848
Hitié, U. 1850
Pignéguy, J..... 1850
Pastor, H..... 1850
Colin, A J 1851
Pragassa, V 1851
Guibert, J 1853
Finniss, W..... 1853
Bouchet, J 1853
Duvivier, Ed. 1853
Ackroyd, J 1859
Desperles, L 1859
Herchenroder, T. 1860
Laval, V 1860

Chazal, P. E. de 1860
St-Perne, E. P 1860
Tessier, G 1860
Victor, F. 1860
Mallet, F. 1861
Ducray, V. G..... 1861
Gautray, C..... 1861
Sicard, N. 1862
Simonet, F..... 1863
Pitot, A 1863
Bétuel, A. 1863
Boullé, V. 1863
Rodesse, L. C..... 1863
Ritter, G A 1864
Perrot, A 1864
Rohan, A 1864
Gilot, F 1865
Halais, J. 1865
Sauzier, M..... 1866

Sauzier, E..... 1866
Commarmond, A..... 1867
Robert, A..... 1868
Desjardins, E. 1870
Rousset, C. 1870
Wohrnitz, L..... 1870
Erny, P. J. A 1871
Rolando, A 1871
St. Pern, L. de 1871
Ganachaud, E. 1871
Ellie, J. 1871
Lastelle, F. 1872
Edwards, E..... 1872
Leblanc, W..... 1872
Margeot, E. 1872

ALPHABETICAL LIST OF MATTERS

FOR 1872.

A

B

C

D

E

J

L

M

N

R

S

ALPHABETICAL LIST OF CASES

FOR 1872.

PLAINTIFFS AND DEFENDANTS

ALPHABETICAL LIST OF CASES

FOR 1872.

DEFENDANTS AND PLAINTIFFS